FILE COPY

IN THE

# SUPREME COURT OF THE UNITED STATES

FILED
MAY 2 1960
JOHN T. BROWNING, Clerk

OCTOBER TERM, 19.....

No. 899.

THE KANSAS TURNPIKE AUTHORITY,
*Petitioner,*

vs.

EDWIN JOHN ABRAMSON and EMMETT JOHNS,
Executors of the Estate of JOHN P. ABRAMSON,
Deceased, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

EDWARD F. ARN,
201 Beacon Building,
Wichita, Kansas,

RICHARD F. MULLINS,
201 Beacon Building,
Wichita, Kansas,

MILO M. UNRUH,
201 Beacon Building,
Wichita, Kansas,

H. R. KUHN,
201 Beacon Building,
Wichita, Kansas,

C. WARNER EISENBISE,
201 Beacon Building,
Wichita, Kansas,

GALE MOSS,
El Dorado, Kansas,

DALE SPIEGEL,
Emporia, Kansas,
*Attorneys for Petitioner.*

BLEED THROUGH POOR COPY

## INDEX


Opinion Below ..... 2
Jurisdiction ..... 2
Questions Presented ..... 2
State Statutes Involved ..... 3
Statement ..... 3

Argument—

I. Is There Diversity Jurisdiction in the Federal Courts under the Eleventh Amendment to the Constitution of the United States Over State Governmental Agencies Carrying on Essential Government Functions Such As Does the Kansas Turnpike Authority—and (Although Not Here Directly Involved) Such As Does the State Highway Commission of Kansas, the State Board of Regents, the State National Guard Armory Board, and the State Office Building Commission ..... 7

II. Can the Contract Between Contractor-Respondent and This Petitioner Be So Construed As a Matter of Law to Permit the Contractor to Recover from This Petitioner, the Kansas Turnpike Authority, for Reworking and Recompacting a Road Grade Damaged by Climatic Effects Prior to the Authority's Acceptance of the Work When Such Written Acceptance Is Specifically Required by the Contract ..... 18

Conclusion ..... 20

Appendix—

Appendix A—

Opinion of the Circuit Court of Appeals for the Tenth Circuit, No. 6200 ..... A1

Conclusion of Law by the District Judge ..... A10

Appendix B—

Statutes of the State of Kansas
(and gist of the title):

68-2002, G.S., 1959 Supp., provides State Turnpike Authority May Construct a Turnpike Anywhere in the State ..... A11

68-2003, G.S., 1959 Supp., Creates the Kansas Turnpike Authority ..... A11

68-2004, G.S., 1959 Supp., Provides That Kansas Turnpike Authority Has Power to Sue and Be Sued (but for Limited Purposes, As Held 180 Kan. 749) ..... A12

68-2005, G.S., 1959 Supp., provides that any state (public) lands necessary for construction of turnpike are hereby donated ..... A12

68-2006, G.S., 1959 Supp., provides all right of way and personal property of Kansas Turnpike Authority taken in name of state of Kansas ..... A12

68-2008, G.S., 1959 Supp., provides that turnpike bonds are revenue bonds and not a debt of the state ..... A12

68-2013, G.S., 1959 Supp., provides that turnpike project constitutes performance of essential governmental function ..... A13

68-2017, G.S., 1959 Supp., provides that when bonds are paid the turnpike becomes a part of the state highway system and revenues go into state highway fund ..... A13

68-2025, G.S., 1959 Supp., provides that Kansas Turnpike to be policed by Kansas State Highway Patrol (State Police) ..... A13

68-2033, G.S., 1959 Supp., provides that turnpike projects may be financed from state highway fund and reimbursed from turnpike tolls ..... A14

BLEED THROUGH POOR COPY

74-2001, G.S. 1949, creates State Highway Commission of Kansas with power to sue and be sued ..... A14

74-2002, G.S. 1949, provides that State Highway Commission has its separate seal ..... A14

74-607, G.S. 1949, provides that State Corporation Commission has its separate seal ..... A14

74-3302c, G.S. 1949, provides that State Forestry, Fish and Game Commission has its separate seal ..... A15

75-3601, G.S., 1959 Supp., provides for creation of State Office Building Commission; members appointed by governor ..... A15

75-3608, G.S., 1959 Supp., provides for State Office Building Commission issuing revenue bonds for construction of state office building; has its separate seal ..... A15

76-6a11, G.S. 1949—revenue bonds of State Board of Regents not to incur indebtedness against state ..... A16

76-6a16, G.S. 1949—revenue bonds not indebtedness of state ..... A16

48-318, G.S. 1949—State Armory Board revenue bonds for construction of National Guard Armories—not indebtedness of state ..... A16

Federal Statutes

Section 1332 of Title 28, United States Code, as amended ..... A17

Constitution of the United States

The Eleventh Amendment to the Constitution of the United States ..... A17

## TABLE OF CASES

American Mutual Insurance Company v. State Highway Commission, 146 Kan. 239, 244, 69 P.2d 1091 ..... 10
Anderson Cattle Co. v. Kansas Turnpike Authority, 180 Kan. 749, 308 P.2d 172 ..... 9
Dunnuck v. Kansas Highway Commission, 21 F. Supp. 882 ..... 8
Fowler v. California Toll-Bridge Authority, 128 F.2d 549 ..... 13
Gresty v. Harry Darby, Director, 146 Kan. 63, 66, 68 P.2d 649 ..... 10
Harrison Construction Company v. Ohio Turnpike Commission, 272 F.2d 337 ..... 7, 8, 12, 16
Hosterman v. Kansas Turnpike Authority, 183 Kan. 590, 331 P.2d 323 ..... 15, 16
K. C. Bridge Co. v. Alabama State Bridge Corp., 59 F.2d 48 (Cert. denied 287 U.S. 644) ..... 13
Kittredge v. Boyd, Treasurer, 136 Kan. 691, 701, 18 P.2d 563 ..... 11
Lehnherr v. Feldman, 110 Kan. 115, 120-122, 202 Pac. 844 ..... 11
Payne v. State Highway Commission, 136 Kan. 561, 566, 16 P.2d 509 ..... 10
Petty v. Tennessee-Missouri Bridge Commission, 254 F.2d 857 ..... 13
Stamey v. Kansas Highway Commission, 76 F. Supp. 946 ..... 8
State ex rel. v. Board of Regents, 167 Kan. 587, 207 P.2d 373 ..... 14
State ex rel. v. Kansas Armory Board, 174 Kan. 369, 256 P.2d 143 ..... 14
State ex rel. v. Kansas Turnpike Authority, 176 Kan. 683, 692, 273 P.2d 198 ..... 9
State ex rel. v. State Highway Commission, 139 Kan. 391, 32 P.2d 493 ..... 10
State ex rel. v. Thompson, Treasurer, 115 Kan. 457, 461-462, 223 Pac. 258 ..... 11
Wyoming State Highway Commission v. Utah Construction Co., 278 U.S. 194, 73 L. Ed. 262 ..... 7, 8, 9

BLEED THROUGH POOR COPY

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19.....

No. .....

THE KANSAS TURNPIKE AUTHORITY,
*Petitioner,*

vs.

EDWIN JOHN ABRAMSON and EMMETT JOHNS,
Executors of the Estate of JOHN P. ABRAMSON,
Deceased, *Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

This is a petition by the Kansas Turnpike Authority for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit rendered in the above entitled cause, and which affirmed the judgment of the United States District Court for the District of Kansas.

## OPINION BELOW.

The opinion and judgment of the United States Court of Appeals for the Tenth Circuit (see C.C.A. Transcript or App. A1)* is not yet officially reported. This cause was originally tried to the District Judge (Hon. W. W. Ritter of Utah) without a jury and no opinion was written. The District Judge refused to make any Findings of Fact (R. 56)*, but did make a Conclusion of Law (R. 16 and App. A10).

## JURISDICTION.

The judgment of the United States Court of Appeals for the Tenth Circuit was rendered, filed and entered on February 29, 1960 (App. A1). The jurisdiction of the Supreme Court of the United States is invoked by virtue of Section 1254 of Title 28 of the United States Code (62 Stat. 928), and this petition is filed within the time provided in Section 2101(c) of Title 28 of the United States Code.

## QUESTIONS PRESENTED.

Broadly stated, there are just two questions involved in the presentation of this petition:

---

*Citations preceded by the letters "App." refer to the Appendix attached to this Petition.

*Citations preceded by the letter "R" refer to the certified transcript of proceedings in the Tenth Circuit Court of Appeals.

BLEED THROUGH POOR COPY

I.

**Is There Diversity Jurisdiction in the Federal Courts under the Eleventh Amendment to the Constitution of the United States over State Governmental Agencies Carrying on Essential Governmental Functions Such As Does the Kansas Turnpike Authority—and (Although Not Here Directly Involved) Such As Does the State Highway Commission of Kansas, the State Board of Regents, the State National Guard Armory Board, and the State Office Building Commission, etc.?**

II.

**Can the Contract Between Contractor-Respondent and This Petitioner Be So Construed As a Matter of Law to Permit the Contractor to Recover from This Petitioner, the Kansas Turnpike Authority, for Reworking and Recompacting a Road Grade Damaged by Climatic Effects Prior to the Authority's Acceptance of the Work When Such Written Acceptance Is Specifically Required by the Contract?**

## STATE (KANSAS) STATUTES INVOLVED.

Several Kansas Statutes may be helpful in consideration of the question of diversity jurisdiction. These several statutes are listed and their nature briefly stated in the Index (*supra*); and their pertinent parts are set forth in Appendix B (App. A11).

## STATEMENT.

The Kansas Turnpike Authority, Appellant-Defendant in the Court below (hereafter referred to as Petitioner), was created as an instrumentality and governmental de-

partment of the State of Kansas by the State Legislature of 1953. Contracts for constructing this 234-mile superhighway were let in 1954-1955 and it was completed and opened to traffic in October, 1956. The Plaintiff-Appellee (hereafter referred to as Respondent) is a contractor from Des Moines, Iowa, who was awarded Contract No. 5-18-E(1) to do 6.91 miles of grading and drainage work (to make ready for laying of pavement) on the Kansas Turnpike.

The contract becomes a rather voluminous document since it includes the Standard Specifications, Supplemental Specifications, and Special Provisions, etc. (R. 57-66, 85-93).

Respondent contractor was paid for his work under this contract except for his claim for extra compensation for recompaction of the road grade which he had to recompact because compaction was lost during a rainy period.

The principal question here involved is one of diversity jurisdiction. The only other question is whether, under the terms of the contract provisions, the Respondent contractor was entitled to be paid for compaction work required to be redone because rains and inclement weather destroyed the first compaction prior to the time it had been accepted as per the official written "Notice of Acceptance" (R. 83-85).

The Respondent contractor was a resident and citizen of the State of Iowa and the amount in controversy exceeded $10,000.00. During the trial in the District Court this petitioner attempted to point out to the District Judge that the Kansas Turnpike Authority was in fact the State of Kansas (R. 43); a Motion to Dismiss for lack of diversity jurisdiction was filed (R. 14, 51) at the conclusion of the evidence; and the question again raised in No. V of Re-

BLEED THROUGH POOR COPY

quested Conclusions of Law (R. 15), which the Trial Judge refused to consider (R. 56).

If the Respondent is entitled to any judgment at all, there is no question as to the amount in judgment rendered by the Trial Court (R. 16). The Tenth Circuit Court of Appeals affirmed the judgment of the Trial Court and, in doing so, held:

> "(1) That the Kansas Turnpike Authority is vested with the power to sue and be sued in its own name, and the State of Kansas is in no wise interested in judgments for or against it; that the State of Kansas was therefore not a real party in interest and the requisite diversity of citizenship is present.*
>
> "(2) That the rains which destroyed the original compaction were 'unusual' rains.* (Second paragraph of Opinion Below).

---

*But also, the State Highway Commission of Kansas is vested with the power to sue and be sued in its own name. As was held in *Wyoming State Highway Commission* v. *Utah Construction Company*, 278 U.S. 194, 73 L. Ed. 262, the Wyoming State Highway Commission was empowered to sue and be sued in its own name and diversity jurisdiction was denied. Kansas, as a state, has a major interest in the Kansas Turnpike—the State itself owns all the right-of-way—the Turnpike is policed by the State Police—and when the Turnpike bonds are paid off, the revenues revert to the State for use on the State system of highways.

*This is a finding upon a question of fact made in the first instance by the Circuit Court. The District Court refused to make Findings of Fact and instead determined Respondent's right to recover as a matter of law upon the Trial Court's interpretation of the contract.

"(3) In each instance save one, viz., Section 9.2, the duty to repair or recompact was contingent upon the negligence or fault of the contractor."**

The opinion, ruling and decision of the Tenth Circuit Court of Appeals, as Petitioner's argument will show, attempted to make a finding of fact that seven inches of rain over a 15-day period (and never over 1.41 inches on any one day) constituted "unusual rains" such as would amount to "an act of God" under Section 7.14 of the Contract Specifications (R. 90-91). The District Court had previously refused to make any findings of fact and had decided the case solely upon a question of law construing the contract.

It seems to this Petitioner that the Circuit Court also, as did the Trial Court, completely ignored important provisions of the Contract Specifications in upholding the Trial Court's legal construction of the contract instrument.

The Circuit Court of Appeals upheld diversity jurisdiction over this Petitioner who, as the ensuing argument will show, was in fact "the State of Kansas" and was therefore not a citizen within the meaning of Section 1332 of Title 28 of the United States Code (App. A17). In addition to the questions here presented, there are other serious matters involved. More and more Turnpike Authorities or Commissions are being created by State Legislatures (but each may differ in its relationship to the state) and

---

**Here the Circuit Court, as did the Trial Court, completely ignored Contract Specification Section No. 5 of Special Provisions (R. 60-61), Section 5.12 (R. 89), Section 9.2 (R. 92), and Section 18.20 (R. 93), all of which clearly state the contractor is responsible for maintaining his grade until final acceptance (and admittedly it was not finally accepted), and is responsible for work becoming defective for *any cause* including ordinary rains or climatic effects.

BLEED THROUGH POOR COPY

particularly the question of diversity jurisdiction will be of growing concern. The recent Sixth Circuit Court case of *Harrison Construction Company* v. *Ohio Turnpike Commission*, 272 F.2d 337 (discussed *post*), was not appealed, so this Petitioner is informed, only because it went to the Sixth Circuit Court of Appeals on an appeal by the contractor from a District Court order dismissing the action for lack of diversity jurisdiction; and that case is now back in the District Court for trial on the merits. This Petitioner, therefore, respectfully suggests that the question of this action against the Kansas Turnpike Authority, being one against the State of Kansas for purpose of federal jurisdiction, is of sufficient importance to justify a review by this Court.

## ARGUMENT.

### I.

**Is There Diversity Jurisdiction in the Federal Courts under the Eleventh Amendment to the Constitution of the United States over State Governmental Agencies Carrying on Essential Governmental Functions Such As Does the Kansas Turnpike Authority—and (Although Not Here Directly Involved) Such As Does the State Highway Commission of Kansas, the State Board of Regents, the State National Guard Armory Board, and the State Office Building Commission, etc.?**

The fundamental error in the ruling by the Court of Appeals upon this question lies in (a) its attempt to distinguish this case from *State Highway Commission of Wyoming* v. *Utah Construction Company*, (Tenth C.C.A.) 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262; (b) its attempt to favorably compare this instant case with and to follow

the recent (December 3, 1959) Sixth Circuit Court case of *Harrison Construction Company* v. *Ohio Turnpike Commission*, 272 F.2d 337; (c) its apparent effort to distinguish between the Kansas Turnpike Authority as a governmental instrumentality created to carry on essential governmental functions and other similar governmental agencies created for similar purposes, such as the State Highway Commission of Kansas, etc.; and (d) its misunderstanding as to the relationship between the State of Kansas, as such, and the Kansas Turnpike Authority as an instrumentality and agency of state government.

In *Wyoming State Highway Commission* v. *Utah Construction Company, supra*, the Supreme Court of the United States clearly stated that the Wyoming Highway Commission is "the State" insofar as diversity jurisdiction under Section 1332, Title 28 of the United States Code and under the Eleventh Amendment to the Constitution of the United States (App. A17) are concerned. In the instant case, this Petitioner, the Kansas Turnpike Authority, is such a branch, instrumentality, agency and department of the "State of Kansas" that the State of Kansas is the real party in interest, just as would be the State Highway Commission of Kansas under similar circumstances—or just as was the Wyoming Highway Commission in the *Utah Construction Company* case, *supra*.

The United States District Court in Kansas, in *Stamey* v. *Kansas Highway Commission*, 76 F. Supp. 946, held that there was no jurisdiction in the Federal Courts against the Highway Commission of Kansas on construction contracts; and the same Court, in *Dunnuck* v. *Kansas Highway Commission*, 21 F. Supp. 882, held that the State Highway Commission of Kansas was immune from suits in the Federal Courts unless there was a clear waiver of such immunity and that there was no such waiver by a mere legislative

BLEED THROUGH POOR COPY

provision that the Commission could sue and be sued. The United States District Court for the District of Kansas in these cases followed *Wyoming Highway Commission* v. *Utah Construction Company, supra,* in denying Federal diversity jurisdiction over the Kansas Highway Commission. Furthermore, the Supreme Court of Kansas said in *Anderson Cattle Company* v. *Kansas Turnpike Authority,* 180 Kan. 749, 308 P.2d 172:

> "* * * The Kansas Turnpike Authority is an arm or agency of the State of Kansas, created by the Legislature to perform an essential governmental function for the people of the State of Kansas (G.S. 1955 Supp., 68-2013); * * * But the State has not, by the Turnpike Act, given its general consent to be sued for all purposes. In this respect the Act is similar to the Act creating the Kansas Highway Commission."

By the above quoted language the Kansas Supreme Court has said the Kansas Turnpike Authority, like the Kansas Highway Commission (and, incidentally, like the Wyoming Highway Commission) partakes of and shares in the State's immunity against suit.

The Kansas Supreme Court, in *State ex rel.* v. *Kansas Turnpike Authority,* 176 Kan. 683, 692, 273 P.2d 198, said:

> "* * * We think it clear that the Legislature had power to create an arm of the State *other than* the State Highway Commission to construct a particular type of highway; that the proposed turnpike project is a part of a *state* system of highways." (Italics supplied).

Thus, the Kansas Supreme Court has held the Kansas Turnpike Authority (like the Kansas Highway Commission) to be an arm, instrumentality, agency and department of the State of Kansas so as to partake of the State's immunity against suit; and the Kansas Supreme Court has

clearly recognized that the Turnpike project is a part of the *state* system of highways.

The Supreme Court of Kansas again held in *American Mutual Insurance Company* v. *State Highway Commission*, 146 Kan. 239, 244, 69 P.2d 1091, that an action against the State Highway Commission is an action against the State of Kansas. See also *Payne* v. *State Highway Commission*, 136 Kan. 561, 566, 16 P.2d 509; and *Gresty* v. *Harry Darby, Director*, 146 Kan. 63, 66, 68 P.2d 649.

Respondent contended below and will contend here that Kansas Turnpike funds are not appropriated by the Legislature and are not disbursed by the State Treasurer and, therefore, cannot be "state funds" in which the State of Kansas is interested. Apparently the Circuit Court of Appeals held to that same view. However, the Supreme Court of Kansas has held otherwise with respect to state highway funds which are specially raised by collection of gasoline tax and specially earmarked for highway work and, hence, need not be appropriated by the Legislature—and the same would be true with respect to funds of the Kansas Turnpike Authority. In *State ex rel.* v. *State Highway Commission*, 139 Kan. 391, 32 P.2d 493, the Supreme Court of Kansas said:

> "They (Kansas Legislature) made no specific provision that the moneys so raised (from gasoline tax) and used should necessarily find their way into the State Treasury, but left the Legislature free to provide for the collection and disbursement of such funds in the way it deemed best. What the Legislature did was to provide that these moneys, as collected, should be transmitted to the state treasurer and by him placed in the highway fund and disbursed on proper orders by the highway commission (Laws of 1929, Chapter 255, Sections 17 and 18); since these funds are not required by the Constitution to find their way into the state

BLEED THROUGH POOR COPY

treasury, and by statute do not do so, Section 24 of Article 2, requiring appropriation of moneys from the state treasury, has no application. These funds are collected for a specific purpose. The Legislature would have no authority to appropriate them for other purposes. They are collected, segregated, set aside, and can be used for one purpose only, namely, the construction and maintenance of state highways. This is not the only fund the state has, which, although deposited with the state treasurer and disbursed by him under proper directions of other officials, does not find its way into the state treasury, and therefore does not require specific appropriation every two years by the Legislature (*Lehnherr* v. *Feldman*, 110 Kan. 115, 120-122, 202 Pac. 844; *State ex rel.* v. *Thompson, Treasurer*, 115 Kan. 457, 461-462, 223 Pac. 258; *Kittredge* v. *Boyd*, 136 Kan. 691, 701, 18 P.2d 563)."

Thus, if the Federal Courts are going to hold that the Kansas Turnpike Authority is not "the State of Kansas" because the Legislature does not appropriate turnpike funds and because the State Treasurer does not disburse such funds, then it must also be held that the State Highway Commission of Kansas is not the State of Kansas for purpose of Federal diversity jurisdiction—and this would be contrary to decision already made by the Supreme Court of the United States and by the Kansas Supreme Court and by the United States District Courts for the District of Kansas in interpreting the Kansas law.

The Kansas Legislature created the Kansas Turnpike Authority as a body politic, constituted it a public instrumentality, and provided that its construction and operation of a Turnpike project was an essential governmental function (Section 68-2003, G.S., 1955 Supp. and 1957 Supp.). This same statute provides for seven members of the Kansas Turnpike Authority, four to be appointed by the Governor of Kansas, one to be the Director of the Kansas State

Highway Commission (also appointed by the Governor), and two State Legislators, *viz.*, the Chairman of the State Roads and Highways Committee and the Chairman of the House Roads and Highways Committee.

Like the Kansas State Highway Commission (Section 74-2001, G.S., 1949), the Kansas Turnpike Authority is created as a public body corporate with the power to sue and be sued (Section 68-2004, G.S, 1957 Supp.). That is to say, of course, that the Turnpike Authority may sue and be sued in a limited way and in such instances as the Legislature has waived state immunity. Like the Kansas State Highway Commission (Section 74-2002, G.S., 1949), the Kansas Turnpike Authority has its own seal, separate and apart from the great seal of the State of Kansas (Section 68-2004, G.S., 1957 Supp.). Having a separate "seal" is a common thing for state departments in Kansas. For example and in addition to the Turnpike Authority and the Kansas State Highway Commission, the State Corporation Commission has its own seal (Section 74-607, G.S., 1949), and the State Forestry Fish and Game Commission has its separate seal (Section 74-3302 C, G.S., 1949). Also, the State Office Building Commission has its separate seal (Section 75-3608 (2), G.S., 1957 Supp.).

All state lands deemed to be necessary for the Kansas Turnpike project are donated by the State of Kansas for that purpose (Section 68-2005, G.S., 1957 Supp.). And it will be noted this is in contrast to the system followed in Ohio (discussed later) where the Ohio Turnpike Commission must purchase state lands from the state. See *Harrison* v. *Ohio Turnpike Commission*, 272 F.2d 337.

All property (real, personal or right-of-way) of the Kansas Turnpike Authority is taken in the name of the State of Kansas (Section 68-2006, G.S., 1957 Supp.).

BLEED THROUGH POOR COPY

In *Flower* v. *California Toll-Bridge Authority,* 128 F.2d 549 (Ninth C.C.A.), it was held that where the toll-bridge would become a part of the state highway system after the bridge was completely paid for by the tolls, that the action was in fact one against the State of California and was thus prohibited by the Eleventh Amendment to the Constitution of the United States (App. A17). Also, the Fifth Circuit, in *K. C. Bridge Co.* v. *Alabama State Bridge Corporation,* 59 F.2d 48 (Cert. denied, 287 U.S. 644), held that an action against the State Bridge Corporation was one against the State. And the Eighth Circuit Court of Appeals, in *Petty* v. *Tennessee-Missouri Bridge Commission,* 254 F.2d 857, held that where the State Bridge Commission had no right to levy taxes but pledged its tolls exclusively for repayment of the bonds, the State Bridge Commission was immune from Federal jurisdiction by reason of the Eleventh Amendment.

Under Section 68-2017, G.S., 1957 Supp., this Kansas Turnpike project is to become a part of the Kansas state highway system under jurisdiction of the State Highway Commission when the turnpike revenue bonds are retired—and at that time the Kansas Highway Commission may collect and receive the revenues. Thus, the more judgments paid at this time out of turnpike revenues, the longer it will be before the State Highway Commission of Kansas receives these revenues into the general highway fund.

Section 68-2025, *et seq.*, G.S., 1957 Supp., provide for the Turnpike being policed by the Kansas State Highway Patrol upon agreement with the State Highway Commission. The Kansas Turnpike Authority may borrow moneys from the state highway fund of the State Highway Commission, but reimbursement must be made out of turnpike toll revenues (Section 68-2033, G.S., 1957 Supp.).

It is a common thing in Kansas to provide for revenue bonds without their payment being guaranteed by the state. Revenue bonds (with no state obligation) are commonly used by various state departments in instrumentalities, *viz.*, the Kansas Turnpike Authority (Section 68-2007, 68-2009, G.S., 1957 Supp.); the State Board of Regents for state university dormitory bonds (Section 76-6 all and Section 76-6a16, G.S., 1949); the State Office Building Commission for construction and equipping of a state office building to house all facets of state government (Section 75-3608, G.S., 1957 Supp.). It is a weak argument to say that because revenue bonds are not a direct obligation of the state, that the state agency and instrumentality issuing them is not a part of the state government. Nothing could be more directly a part of the governmental entity of Kansas than its Board of Regents having jurisdiction over state universities and colleges, or than the State Office Building Commission which built the state building on the capitol grounds for the housing of state government itself.

In *State ex rel.* v. *Board of Regents,* 167 Kan. 587, 207 P.2d 373, the Supreme Court of Kansas held that revenue bonds for dormitories at state universities were not debts of the State of Kansas for the very reason that the law authorizing those bonds so provided. The Court said further:

> "The bonds do not pledge the faith and credit of the state, they do precisely the contrary. The bondholder knows he may look only to the revenue from the buildings for payment. Whether he desires to make such an investment is a matter left entirely to his own discretion and judgment." (l.c. 591).

In *State ex rel.* v. *Kansas Armory Board,* 174 Kan. 369, 256 P.2d 143, the Kansas Supreme Court upheld the statute which created the Armory Board as a state agency with

BLEED THROUGH POOR COPY

power to sue and be sued and authorized it to issue revenue bonds (but not obligations of the state) for construction of National Guard Armories.

The State of Kansas is the principal and real party in interest with respect to the dormitories at its state universities—and with respect to the state office building housing the various facets and departments of state government—and with respect to the Armory Board's jurisdiction over National Guard Armories—and also with respect to the Kansas Turnpike which is a part of the state system of highways. We again submit that merely because all of these bonds in every instance are revenue bonds not guaranteed by the State, that such fact alone can have no bearing upon the question of these various agencies and instrumentalities being "the State" within the meaning of Federal diversity jurisdiction.

In *Hosterman* v. *Kansas Turnpike Authority*, 183 Kan. 590, 331 P.2d 323, the Kansas Supreme Court said:

> "The Kansas Turnpike Authority is an arm and agency of the state, created by the legislature to perform an essential governmental function for the people of the state (l.c. 592) * * *. At no place in the act is there any waiver of the state's immunity from tort liability—rather the waiver extends to and is limited only to the statutory right of action created by the act in G.S., 1955 Supp., Section 68-2015. * * * The turnpike act does not waive the state's immunity from tort liability."

Petitioner contends that if the Kansas Supreme Court did not regard the Kansas Turnpike Authority as "the State of Kansas" it would not be rendering decisions to relieve the Kansas Turnpike Authority from all tort liability because of its possessing state immunity.

The opinion of the Tenth Circuit Court of Appeals (App. A1), says that this Petitioner, the Kansas Turn-

pike Authority, is "a creature of the legislature empowered to perform designated *proprietary* functions." (Italics supplied). However, the Kansas Legislature (Section 68-2003, G.S., 1957 Supp.), says the powers of the Kansas Turnpike Authority *"shall be deemed and held to be the performance of an essential governmental function"* (italics supplied). The Supreme Court made the same statement in *Hosterman* v. *Kansas Turnpike Authority, supra.*

Apparently the Tenth Circuit Court of Appeals, in upholding diversity jurisdiction here, relied exclusively upon *Harrison Construction Company* v. *Ohio Turnpike Commission*, 272 F.2d 337. While Petitioner contends the opinion in that Ohio Turnpike case is not in accord with the basic decisions heretofore made by the United States Supreme Court, it is still quite distinguishable from the facts and circumstances involving the Kansas Turnpike Authority. For example, in the Ohio case (l.c. 339), the Sixth Circuit Court made it quite plain that the Ohio Turnpike Commission must compensate the State of Ohio for any state lands taken. But in Kansas the State must donate any state lands necessary for turnpike construction (last paragraph of Section 68-2005, G.S., 1957 Supp.). Furthermore, the Ohio Supreme Court had not held the Ohio Turnpike Commission to be the alter-ego of the State, as has the Kansas Supreme Court

Also, the Sixth Circuit Court, in the case of *Harrison Construction Company* v. *Ohio Turnpike Commission, supra,* said:

> "This action will not and can not in any way affect the treasury of the State of Ohio (l.c. 340)."

But under the Kansas law the State of Kansas (through the State Highway Commission) takes over and operates and collects and receives the revenue from the turnpike

BLEED THROUGH POOR COPY

fund as soon as the revenue bonds are paid off (Section 68-2017, G.S., 1957 Supp., App. A13). Thus, the earlier the revenue bonds are retired, the sooner these revenues come into and are used by the general state highway fund. Furthermore, under the Kansas law, as distinguish from Ohio, the state highway fund comes from gasoline taxes and is earmarked for highway use and for no other purpose and *is not appropriated by the state legislature* (139 Kan. 391, *supra*). In this respect, the state highway fund coming from gasoline tax and being earmarked for highway uses without appropriation by the legislature, is just like the Kansas Turnpike fund which is earmarked for turnpike use and is not appropriated by the state legislature. The only difference is that the former is held by the State Treasurer pending its use and the latter is held by trustees pending its use—all as determined by the whims of the Kansas Legislature. Under the Kansas law, funds from the revenue bonds of the State Board of Regents issued for the construction of state university dormitories (Section 76-6a16, G.S., 1949, App. A16), are held intact to pay off the bondholders and when those bonds are paid off the state, through its Board of Regents, would receive the revenue into its own fund. The same is true with respect to revenue bonds for the state office building (Section 75-3608, G.S., 1957 Supp., App. A15); and the same is true where the State Armory Board issues revenue bonds with which to construct National Guard Armories (Section 48-318, G.S., 1949, App. A16). Thus, Petitioner contends that it is entirely erroneous to say that merely because revenue bonds issued by any state agency are to be paid from revenues and without obligation of the state that the agency, arm or instrumentality issuing such bonds is engaged in a proprietary function. On the contrary, all such agencies referred to above, including the Kansas Turnpike Authority, are engaged in carrying on essential governmental functions. As

to the Kansas Turnpike Authority and the State Highway Commission, this distinction of governmental function instead of proprietary function is made both by statute and by Kansas Supreme Court decision, as has been indicated above.

II.

**Can the Contract Between Contractor-Respondent and This Petitioner Be So Construed As a Matter of Law to Permit the Contractor to Recover from This Petitioner, the Kansas Turnpike Authority, for Reworking and Recompacting a Road Grade Damaged by Climatic Effects Prior to the Authority's Acceptance of the Work When Such Written Acceptance Is Specifically Required by the Contract?**

The District Court (Hon. W. W. Ritter, Judge), refused to make any findings of fact and decided as a matter of law (R. 56), that the last four lines of Section 20.42 of the Contract Supplemental Specifications (R. 66), legally determined this lawsuit in favor of the contractor. Those four lines which so intrigued the District Court read as follows:

> "Whenever yielding or soft spots are the result of placing improper material, failure to properly compact the embankment, or to provide for surface drainage, repair shall be at the contractor's expense." (R. 66).

Since this short paragraph quoted above does not include instances where yielding or soft spots (or failure of grade compaction) were caused by action of the elements, the Trial Court (and the Tenth Circuit Court) held that repairs necessitated by reason of action of the elements would *not* be the contractor's expense. Petitioner contends that such ruling might have

BLEED THROUGH POOR COPY

been proper if the above four-lined paragraph was all the contract stated on this subject. However, the Courts, in construing a contract as a matter of law, should look to the entire instrument. Apparently the Courts below completely ignored the following contract provisions:

Special Provision No. 5 (R. 60-61).

> "That grading and drainage performed under this contract will be maintained by the contractor until final acceptance of the work or until paving contractor is ready to commence operations."*

Special Provision 8.2 (R. 62-63).

> "The contractor shall notify the resident engineer in writing of the time the work is ready for final inspection."**

Standard Specification 5.12 (R. 89).

> "*Any* defective work from *any cause* found to exist *prior* to final acceptance shall be removed and replaced in an acceptable manner" (italics supplied).

Standard Specification 5.15 (R. 90).

> "When contractor shall have satisfactorily completed the work in an acceptable manner and final inspection made, the engineer shall give contractor written notice of final acceptance."

Standard Specification 8.9 (R. 91).

> "Contractor is released from further work upon written notice of acceptance of the work by the engineer" (this notice not given until after re-work by contractor).

---

*The recompaction work here involved was done before "final acceptance" and before being turned over to the paving contractor.

**This written notice was not given and there was no final inspection prior to the recompaction work here involved.

Standard Specification 9.2 (R. 92).

> "Contractor accepts compensation under the contract in full payment for loss or damage arising from action of the elements occurring prior to final acceptance."*

Standard Specification 18.20 (R. 93).

> "Contractor is responsible for stability of embankment and shall replace at his own expense any portion which has become displaced due to ordinary rains and climatic effects."**

Petitioner submits that the United States Circuit Court of Appeals for the Tenth Circuit, by affirming the District Court judgment construing this contract as a matter of law, sanctioned a departure by the District Court from the usual and accepted course of judicial procedure. Petitioner further contends and submits that if the entire contract is construed within its four corners, it is impossible to arrive at the decision reached below.

## CONCLUSION.

The conflict of the instant decision by the Tenth Circuit Court of Appeals with the applicable decisions of this Court and with those of the Kansas Supreme Court, based upon Kansas statutes, would seem to demonstrate the error committed by the Court below as well as the need for review on

---

*There was never a final acceptance here until after re-work was completed.

**The seven inches of rain from September 22 to October 7 were "ordinary" rains. The Tenth Circuit Court attempted to find that such rains were "unusual"—although the District Court refused to make any such finding thereon, and instead decided the case on the legal construction of the contract terms.

BLEED THROUGH POOR COPY

certiorari by this Supreme Court in order to resolve the fundamental variance herein discussed.

The statutes of Kansas and the authorities interpretations thereof established that the Kansas Turnpike Authority is an integral part and instrumentality of the State Government for the purpose of carrying on an essential governmental function—and not separate entity for mere proprietary functions as erroneously suggested by the Tenth Circuit Court of Appeals. The State of Kansas has a direct pecuniary interest in all claims against the Kansas Turnpike Authority. This action, therefore, is barred by the Eleventh Amendment to the Constitution of the United States (App. A17).

For the reasons heretofore stated, the Petitioner respectfully submits that this Petition for a Writ of Certiorari should be granted.

EDWARD F. ARN,
201 Beacon Building,
Wichita, Kansas,
RICHARD F. MULLINS,
201 Beacon Building,
Wichita, Kansas,
MILO M. UNRUH,
201 Beacon Building,
Wichita, Kansas,
H. R. KUHN,
201 Beacon Building,
Wichita, Kansas,
C. WARNER EISENBISE,
201 Beacon Building,
Wichita, Kansas,
GALE MOSS,
El Dorado, Kansas,
DALE SPIEGEL,
Emporia, Kansas,
*Attorneys for Petitioner.*

## APPENDIX A

## UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

---

January Term, 1960.

---

THE KANSAS TURNPIKE AUTHORITY,
*Appellant,*
vs.
EDWIN JOHN ABRAMSON and EMMETT JOHNS, Executors of the Estate of JOHN P. ABRAMSON, deceased,
*Appellees.*
} Number 6200

(Filed United States Court of Appeals, Tenth Circuit, February 29, 1960. Robert B. Cartwright, Clerk.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

---

Edward F. Arn (Dale Spiegel and Gale Moss were with him on the brief) for Appellant.

Samual Mellinger for Appellees.

Before Murrah, Chief Judge, Lewis, Circuit Judge, and Wallace, District Judge.

---

The appellee contractor for the grading and drainage of a segment of the Kansas Turnpike brought this diversity

action against the Turnpike Authority to recover compensation for redoing work which it had already *acceptably* done, but which was required to be redone due to the fault of no one. The construction contract obligated the contractor to construct, according to specifications, a road bed suitable for the paved surface of the turnpike. This work entailed the laying down of successive layers or "lifts" of earth of specified thickness and moisture density until the embankments were brought to specified grade and drainage. Each lift was to be laid, rolled and inspected before another layer was placed on top of it.

The contractor performed his contract in a satisfactory and acceptable manner on certain parts of the contract area, but before final acceptance as provided in the contract, *unusual rains* over a period of two weeks softened the "upper lifts" of the embankment to such an extent that it was necessary to rework and recompact them in order to bring them up to specifications. When the contractor refused to do the work without additional compensation therefor, it was agreed that he would proceed to do it and that both parties would keep an account of it and they would then decide whether compensation was due. After the work was done, the Authority finally denied a claim therefor, and this suit was commenced. There is no question concerning the value of the work performed. Our salient question is whether the contract should be construed to provide compensation therefor. The trial court so construed it and entered judgment for the contractor in an agreed amount.

The first question is one of jurisdiction, *i. e.*, whether the suit is against the state of Kansas, or rather whether the State is a real party in interest. If so, the suit must be dismissed for lack of diversity. The Kansas Legislature created the Turnpike Authority as a body corporate and

BLEED THROUGH POOR COPY

politic, and as a public instrumentality, with powers to construct, operate and maintain turnpike projects, and to issue revenue bonds of the Authority, payable solely from revenue to finance such projects. It is exempt from all taxes or assessments upon any property acquired or used by it, and it is clothed with sovereign immunity except to the extent to which it has expressly been made liable. See *Anderson Cattle Co.* v. *Kansas Turnpike Authority*, 308 P. 2d 172; *State* v. *Kansas Turnpike Authority*, 273 P.2d 198. But it is vested with power to sue and be sued in its own name, and the State of Kansas is in no wise interested in judgments for or against it. It is unlike the Commission in *Highway Commission* v. *Utah Company*, 278 U.S. 194, which was "but the arm or alter ego of the State with no funds or ability to respond in damages." See p. 199. The Authority is not under the supervision of the State or any agency thereof. In sum, it is a public corporation—a creature of the legislature empowered to perform designated *proprietary* functions without any obligation on the part of the State. The State was therefore not a real party in interest, and the requisite diversity of citizenship is present. Cf. *Harrison Construction Co.* v. *Ohio Turnpike Commission*, (6 C.A.—decided Dec. 3, 1959) 272 F.2d 337.

This brings us to a construction of the contract, and it is well to have in mind some governing canons. The generally accepted rule is that "where one agree to do for a fixed sum a thing possible to be performed, he will not be excused or become entitled to additional compensation because unforeseen difficulties are encountered." *United States* v. *Spearin*, 248 U.S. 132, 136; see also *Day* v. *United States*, 245 U.S. 159; *Barnard-Curtis Co.* v. *United States*, 244 F.2d 565; *Smith* v. *Phillips*, 128 F. Supp. 61; *Newcome* v. *Schaeffler*, 279 P.2d 409; Restatement Contracts, Sec. 3467; Williston Rev. Ed., Sec. 1963-64. In the words of the Kansas

court, "When the principal object of the contract is to obtain a result * * * the risk of accomplishing such purpose or result is on the builder." *Glass* v. *Weisner*, 338 P.2d 712, 716. Where, however, the contract provides for the performance of a given undertaking in accordance with prescribed plan and specification, this rule does not apply, because the contractor is not permitted to vary from the prescribed plans and specifications "even if he deems them improper and insufficient; and therefore cannot be held to guarantee that work performed as required by them will be free from defects, or withstand the action of the elements, or accomplish the purpose intended. Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled and he remains liable only for defects resulting from improper workmanship or other fault on his part, unless there be a provision in the contract imposing some other or further obligation." *Frederick* v. *Redwood County*, 190 N.W. 801; also quoted in *McCree & Co.* v. *State*, 91 N.W.2d 713. See also *Schliess* v. *City of Grand Rapids*, 90 N.W. 700. Whether ours is an "end result" contract or a "specified manner and method" one depends of course upon the intention of the parties, to be gathered from its text and context. Construction by classification or categorization is rendered difficult, if not impossible, by the fact that contracts like ours call for an end result according to specifications. And so, in the last analysis, we must look to the contract by the whole of its parts to determine whether the parties actually intended to provide compensation for extra work required to be done through the fault of no one. Or, more specifically, the question is who assumed the unforeseen risk of the elements.

The construction contract incorporated the standard specifications for state road and bridge construction by the

BLEED THROUGH POOR COPY

Kansas State Highway Commission. And, it also incorporated special Kansas Turnpike provisions and supplemental specifications, all of which were made integral parts of the construction contract, with the proviso that in the event of a discrepancy between the standard or general specifications and the supplemental specifications or special provisions, the latter would govern.

Section 5.1 of the general provisions of the contract authorized the project engineer to decide "all questions which may arise as to the interpretation in the plans and specifications, and all questions as to the acceptable fulfillment of the terms of the contract." The appellant first takes the position that authority to decide all questions arising out of the interpretation of the plans and specifications and the fulfillment of the terms of the contract carried with it the power and authority to construe the contract to determine whether it provided for the payment of additional compensation for the work redone and for which claim is made here. The parties were of course free to stipulate that the Authority's engineer, or any one else for that matter, would be the final arbiter of all disputes arising out of the performance of the contract. And see *United States* v. *Gleason,* 175 U.S. 588, 602; *United States* v. *Wunderlich,* 342 U.S. 98. The provision of the contract invoked is under the heading "Control of Work", and in its context seems to make the engineer the sole judge of whether the performance of the contract was in accordance with the plans and specifications and not to delegate to him the power to decide questions of law involving an interpretation of the contract, traditionally left to the courts. Certainly we should not construe the contract to preclude judicial inquiry unless intention to do so was clear and unequivocal. Indeed, the appellant states that the only question for decision is one of law to con-

strue the contract within its four corners, including the various specifications which are integral parts thereof. We do not think the parties intended to commit this legal question to the Authority's engineer. Cf. *United States* v. *Nickel*, 243 F.2d 924.

Coming then to the pertinent provisions of the contract, Section 4.1 of the general specifications recited in material part that it was the intent of the plans and specifications "to provide for the execution and completion in every detail of the work described herein." And, as we shall see, the plans and specifications did provide for every detail of the work to be performed under the contract as well as the method and manner of performing it. Section 7.14 under the topical heading of "Legal Relationships and Responsibilities to the Public", stipulated that the contractor should have charge and care of the work and "shall take every precaution against injury or damage to any part thereof by the action of the elements or from any other cause * * *; and that "The contractor shall rebuild, repair, restore and make good all injuries or damages to any portion of the work occasioned by any of the above causes before final acceptance, and shall bear the expense thereof, except damage to the work due to unforseen causes beyond the control of and without fault or negligence of the contractor, including, but not restricted to, acts of God * * *." There is nothing in this Section of the contract which could be construed as obligating the contractor to make good injuries or damages to the fill or embankment caused solely by the action of the elements without fault or negligence of the contractor. But in Section 9.2, under the heading "Measurement and Payment", the contractor agreed to accept the compensation provided in the contract "in full payment * * * for loss or damage arising from the nature of the work or from action

BLEED THROUGH POOR COPY

of the elements, or from any unforseen difficulties which may be encountered during the prosecution of the work until the final acceptance by the engineer * * *." On their face, these provisions seem contradictory, and so we must look further for conciliation.

Section 18, entitled "Embankments-Construction Methods", provided that "The contractor shall be responsible for the stability of all constructed embankments, and shall replace at his own expense any portion which, in the opinion of the engineer, have become displaced due to carelessness or negligent work on the part of the contractor, or by reason of ordinary rains and climatic effects." The record shown that immediately after the embankment had been brought up to grade and specifications, 7.27 inches of rain fell in this area from September 22 to October 5. No one contends that this amount of rain was ordinary for this time and place.

Under the special provisions, the contractor agreed to maintain the grade and drainage being performed "until final acceptance of the work, or until such time as the paving contractor is ready to commence operations in the areas concerned." In the supplemental specifications and under Section 13.40 entitled "Method of Measurement", the contractor agreed to remove, replace and recompact the embankment material at his own expense where soft or spongy spots are the result of placing improper material in the embankment, or failure to properly compact the material. And finally we come to Section 20.42 of the supplemental specifications providing in detail for "compaction requirements". This section of the contract, which revised the entire sub-article on "Compaction of Earthwork", specifically provided for the blading and rolling of the entire surface of each layer or lift of earth "to insure

that all the fill material is uniformly compacted to the required density"; "in the event any yielding or soft spots were developed under this rolling, it should be repaired and made firm to withstand this rolling before additional lifts are made." The section furthermore specifically provided that "wherever in any stage of construction yielding or soft spots are a result of placing improper material, failure to properly compact the embankment, or to provide for surface drainage, repair shall be at the contractor's expense."

In a colloquy between court and counsel during the trial, counsel for the authority, speaking of the practical construction of the contract, significantly stated that, "There is one thing we do in practice, we apply the paragraph in subject 5 to the subject covered by No. 5. We apply the provisions under paragraph 18 to embankments. We apply the provisions under paragraph 20 to compaction. And in doing that we don't get the ambiguity that Your Honor has seen in this lawsuit."

Judged by the language of the foregoing section on compaction, it would seem, as the trial court reasoned, that the parties did specify not only the manner and method of compacting the embankment, but the conditions under which the contractor would be required to recompact the embankment in the event of failure. And as we have seen, the parties were at pains elsewhere in the contract to particularize the instances and conditions in which the contractor was under a duty to repair, rebuild, replace, restore, or recompact yielding or soft spots which developed in the embankment during the construction and before final inspection. *And in each instance, save one, viz., Section 9.2, the duty to repair or recompact was contingent upon the negligence or fault of the contractor.*

BLEED THROUGH POOR COPY

When the contract is viewed by the whole of its parts, it is certainly susceptible of the construction that the parties did intend to specify the circumstances and conditions under which the contractor would be liable to repair or recompact the embankments. Having thus specified the conditions upon which the contractor shall be required to recompact, it seems permissible to say, as did the trial court, that the plans and specifications, considered as a whole, contemplated that the contractor would be paid for recompacting the embankment which he had constructed according to specifications and which failed through no fault of his. This construction of the contract is consonant with evidence in the record to the effect that the parties on the job construed the contract to provide that if the fill or embankment was properly constructed and inspected by the engineers, and left free draining and soft spots developed, the contractors were to be paid for recomputing the fills and embankment. And it is also consistent with record evidence that this construction of the contract comported with custom and usages in the industry.

Viewed in this light, we certainly cannot say that the trial court's construction of the contract was clearly erroneous, and the judgment is affirmed.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

EDWIN JOHN ABRAMSON and EMMET JOHNS, Executors of The Estate of JOHN P. ABRAMSON, Deceased,
Plaintiffs,

vs.

THE KANSAS TURNPIKE AUTHORITY,
Defendant.

Civil Action No. W-1303.

**CONCLUSION OF LAW.**

The Court concludes as a matter of law that Contract 5-18-E(1) and its integral parts must be so construed that by its very terms, and particularly Section 20.42 of the Supplemental Specifications thereof, the plaintiffs are entitled to have judgment against defendant for the recompaction work done under said contract.

Willis W. Ritter,
United States District Judge.

Approved:

Beck, Mellinger & Atherton,
By: Samuel Mellinger,
Attorneys for Plaintiff.

Arn, Mullins, Unruh, Timmerman & Kuhn,
By: Edward F. Arn,
Attorneys for Defendant.

Entered May 28, 1959.

BLEED THROUGH POOR COPY

## APPENDIX B.

**Statutes of Kansas:**

68-2002, G.S., 1959 Supp. Turnpike projects. "In order to provide for the construction of modern express highways or super-highways embodying, where feasible and necessary, safety devices, including center division, ample shoulder widths, longsight distances, multiple lanes in each direction and grade separation at intersections with other highways and railroads, and thereby facilitate vehicular traffic, provide better connections between the highway system of Kansas and the highway systems of the adjoining states, remove many of the present handicaps and hazards on the congested highways in the state, and promote the argicultural and industrial development of the state, the Kansas turnpike authority (hereinafter created) is hereby authorized and empowered to construct, maintain, repair and operate turnpike projects (as hereinbefore defined), and to issue revenue bonds of the authority, payable solely from revenues, to finance such projects."

68-2003, G.S., 1959 Supp. "There is hereby created a body politic and corporate to be known as the 'Kansas turnpike authority.' The authority is hereby constituted a public instrumentality and the exercise by the authority of the powers conferred by this act in the construction, operation and maintenance of turnpike projects shall be deemed and held to be the performance of an essential governmental function.

"The Kansas turnpike authority shall consist of seven members. Four members shall be appointed by the governor, who shall serve for terms expiring on July 1, 1954,

July 1, 1955, July 1, 1956, and July 1, 1957, respectively; the term of each such member to be designated by the governor. The fifth member of the authority shall be the state director of highways. The sixth member shall be the chairman of the committee on highways of the senate and the seventh member shall be the chairman of the roads and highways committee of the house."

68-2004, G.S., 1959 Supp. "The authority is hereby authorized and empowered to: * * * (d) sue and be sued in its own name, plead and be impleaded; * * *"

68-2005, G.S., 1959 Supp. (Last paragraph of statute.)

"The state hereby consents to the use of all lands owned by it, including lands lying under water, which are deemed by the authority to be necessary for the construction or operation of any turnpike project."

68-2006, G.S., 1959 Supp. "The authority is hereby authorized and empowered to acquire by purchase, whenever it shall deem such purchase expedient, solely from funds provided under the authority of this act, such lands, structures, property, rights, rights of way, franchises, easements and other interest in lands, including lands lying under water and riparian rights, which are located within the state, as it may deem necessary or convenient for the construction and operation of any project, upon such terms and at such prices as may be considered by it to be reasonable and can be agreed upon between it and the owner thereof, and to take title thereto in the name of the state."

68-2008, G.S., 1959 Supp. (First sentence of section.) "Revenue bonds issued under the provisions of this act shall not be deemed to constitute a debt of the state or of any political subdivision thereof, or a pledge of the faith

BLEED THROUGH POOR COPY

and credit of the state or of any such political subdivision thereof, but all such bonds shall be payable solely from the funds herein provided therefor from revenues * * *."

68-2013, G.S., 1959 Supp. Exemption from taxation. "The exercise of the powers granted by this act will be in all respects for the benefit of the people of the state, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and as the operation and maintenance of turnpike projects by the authority will constitute the performance of essential governmental functions, the authority shall not be required to pay any taxes or assessments upon any turnpike project or any property acquired or used by the authority * * *."

68-2017, G.S., 1959 Supp. "Except as hereinafter provided in this section, when all bonds issued under the provisions of this act in connection with any turnpike project and the interest thereon shall have been paid or a sufficient amount for the payment of all such bonds and the interest thereon to the maturity thereof shall have been set aside in trust for the benefit of the bondholders, such project, if then in good condition and repair, shall become a part of the state highway system and shall thereafter be maintained by the state highway commission. The state highway commission, when such project becomes a part of the state highway system, shall have the same power as vested in the authority by Section 9 (68-2009) of this act to fix, revise, charge and collect tolls for the use of such turnpike project and to contract for the use of any part thereof and to fix the terms, conditions, rents and rates of charges for such use; and such tolls, rents and rates of charges shall be sufficient to provide enough revenue to maintain, repair, operate, regulate and police such turnpike * * *."

68-2025, G.S., 1959 Supp. "The Kansas turnpike authority and the superintendent of the Kansas highway

patrol are hereby authorized to provide by contract or agreement, as provided herein, for the policing of any toll or turnpike constructed and operated as permitted and provided by law. * * *"

68-2033, G.S., 1959 Supp. "The state highway commission and the authority are hereby authorized and empowered to make and enter into any and all contracts and agreements, including (but without limitation) any contract or agreement for the removal or construction of any bridge or other highway facility which they may deem necessary, desirable or incidental to the financing, construction, maintenance, repair or operation of any turnpike project financed under the provisions of this act * * *.

"* * * Any such contract or agreement shall provide for reimbursement by the authority, from tolls or other revenues of such turnpike projects, to the commission for the credit of the state highway fund, at any time or times and under such terms and conditions as may be set forth therein, of any amounts previously paid to the authority by the commission pursuant to the provisions of this paragraph * * *."

74-2001, G.S. 1949. "That there is hereby created a State Highway Commission which shall be a body corporate with powers to sue and be sued. Such highway commission shall consist of six members to be appointed by the governor. * * *"

74-2002, G.S. 1949. "* * * It (state highway commission) shall keep a common seal of such design as the commission shall determine. * * *"

74-607, G.S. 1949. "Said corporation commission shall keep an accurate record of all its official acts, and shall also provide a seal. All processes or certificates issued or

BLEED THROUGH POOR COPY

given by said commission shall be attested by its seal. Copies of the record of the commission, certified by the secretary and attested by the seal of the commission, shall be received in evidence with like effect as copies of other public records."

74-3302c, G.S. 1949. "The director of the Forestry, Fish and Game Commission shall keep a seal of office, which shall be used to authenticate all papers and documents issued and executed by him as such officer."

75-3601, G.S., 1959 Supp. "There is hereby created a State Office Building Commission which shall consist of seven members to be appointed by the governor."

75-3608, G.S., 1959 Supp. State Office Building Commission; Powers: (2) "The power and capacity of suing and being sued, of contracting and being contracted with, of making and using a common seal and altering it at pleasure; and shall in its name, as a body corporate and public, and an instrumentality of the state of Kansas, perform the duties and functions hereinbefore and hereinafter specified, and in furtherance thereof have and exercise the powers conferred on it by law, and such other powers as may be incidental in connection therewith.

"(8) The power to borrow money, make and issue negotiable notes, bonds, warrants and other evidences of indebtedness or obligations (hereinafter called 'bonds') in the name of the state of Kansas and to secure the payment of such bonds or any part thereof by pledge or deed of trust of all or any of its revenues, rentals and receipts; and to make such agreements with the purchasers or holders of such bonds, or with others in connection with any such bonds whether issued or to be issued, as the commission shall deem advisable; and in general to provide for the security for said bonds and the rights of the holders

thereof; Provided, That the total amount of bonds issued under the authority conferred by this section and any other sections of this act shall not exceed seven million five hundred thousand dollars ($7,500,000).

"(12) The power to do all things and acts necessary or convenient to carry out the powers granted to it by this act or any other act: Provided, that the commission shall have not any time, or in any manner, to pledge the credit or taxing power of the state, nor shall any of the bonds or other obligations issued hereunder be deemed to be an indebtedness or debt of the state of Kansas within the meaning of section 6 of article 11 of the Constitution of the state of Kansas."

76-6a11, G.S. 1949. "Nothing contained in this act shall authorize or empower the Board (State Board of Regents) to incur any indebtedness against said Board, or any of the institutions under its control, or against the state of Kansas, and the entire obligation of said Board shall be limited to the charging and collecting the fees and charges as provided by Sections 4 and 5 of this act and to the application of the fees and charges so collected in the manner prescribed by Section 6 of this act."

76-6a16, G.S. 1949. "Revenue bonds issued hereunder shall not be an indebtedness of the state of Kansas or of the Board of Regents or of the individual members of said Board and shall not constitute an indebtedness within the meaning of any constitutional or statutory limitation upon the incurring of indebtedness."

48-318, G.S. 1949. "Under no circumstances shall any security issued under the provisions of this act (Kansas Armory Board) be or become an obligation or indebtedness of the state of Kansas or of any political subdivision or municipality thereof, nor shall any such security be or

BLEED THROUGH POOR COPY

become an indebtedness of the Board within the purview of any constitutional limitation or provision, and it shall be plainly stated on the face of each such security (National Guard Armory bonds) that it does not constitute such an indebtedness or obligation but is payable solely from the rents, issues and profits as aforesaid." (Parentheses supplied).

**Federal Statutes:**

Section 1332 of Title 28, United States Code, as amended. "Diversity of citizenship; amount in controversy; costs.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States; * * *"

**Constitution of the United States:**

The Eleventh Amendment to the Constitution of the United States:

"Amendment 11.—SUITS AGAINST STATES

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

ILE COPY

Office-Supreme Court
FILED
MAY 23 19
JAMES R. BROWNING

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19....

No. 899

THE KANSAS TURNPIKE AUTHORITY,
*Petitioner,*

vs.

EDWIN JOHN ABRAMSON and EMMETT JOHNS,
Executors of the Estate of JOHN P. ABRAMSON,
*Respondents.*

## REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

CLARENCE V. BECK,
Citizens National Bank Building,
Emporia, Kansas,

SAMUEL MELLINGER,
Citizens National Bank Building,
Emporia, Kansas,

JOHN G. ATHERTON,
Citizens National Bank Building,
Emporia, Kansas,
*Attorneys for Respondents.*

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

BLEED THROUGH POOR COPY

## INDEX


Statement ..... 1

Questions Presented ..... 2

Argument ..... 3

Question I. Do special and important reasons exist for the granting of a review on writ of certiorari in this case? ..... 3

Question II. Is the Kansas Turnpike Authority a "citizen" within the meaning of the diversity of citizenship provisions of Section 1332, U.S.C.A., Title 28, or is the Kansas Turnpike Authority "one of the United States" within the meaning of the Eleventh Amendment to the Constitution of the United States? ..... 4

Question III. Was there substantial evidence before the trial court to support the judgment rendered in this action? ..... 27

Conclusion ..... 30

Appendix—

Statutes of the State of Kansas—

68-2002, G.S., 1959 Supp. ..... A1

68-2003, G.S., 1959 Supp. ..... A1

68-2004, G.S., 1959 Supp. ..... A2

68-2007, G.S., 1959 Supp. ..... A3

68-2008, G.S., 1959 Supp. ..... A3

68-2009, G.S., 1959 Supp. ..... A4

68-2010, G.S., 1959 Supp. ..... A5

68-2011, G.S., 1959 Supp. ..... A5

68-2012, G.S., 1959 Supp. ..... A5

68-2015, G.S., 1959 Supp. ..... A5

68-2017, G.S., 1959 Supp. ..... A6

68-2019, G.S., 1959 Supp. ..... A6

68-2021, G.S., 1959 Supp. ..... A6
68-2022, G.S., 1959 Supp. ..... A7
68-2025, G.S., 1959 Supp. ..... A7
74-2001, G.S. 1949 ..... A8
74-2006, G.S. 1949 ..... A8

## TABLE OF CASES

*Anderson Cattle Company* v. *Kansas Turnpike Authority*, 180 Kan. 749, 308 P.2d 172 ..... 5, 12
*Arnold* v. *Coffey County Comm'rs*, 131 Kan. 343, 291 Pac. 762 ..... 14
*Camden Interstate R. Co.* v. *Catlettsburg*, Ky., (C.C.A. 1904) 129 Fed. 421 ..... 15
*Cargile* v. *New York Trust Co.*, (C.C.A.) 67 P.2d 585 ..... 16
*City of Dearborn* v. *Michigan Turnpike Authority*, 1955, 73 N.W.2d 344 ..... 25
*Darby* v. *L. G. DeFelice & Son*, 94 F. Supp. 535 ..... 9, 22
*Deerhead Township* v. *Fritz*, 152 Kan. 110, 102 P.2d 1035, at page 114 ..... 14
*Dunnuck* v. *Kansas Highway Commission*, 21 F. Supp. 882 ..... 5
*Eikenberry* v. *Township of Bazaar*, 22 Kan. 556 ..... 14
*Fisher* v. *Township*, 87 Kan. 674, 125 Pac. 94 ..... 14
*Florida Turnpike Authority* v. *Van Kirk*, 146 F. Supp. 364 ..... 26
*Fowler* v. *California Toll Bridge Authority*, 9 Cir., 128 F.2d 549 ..... 24
*George Vang, Inc.*, v. *Ohio Turnpike Commission*, D.C., E.D. being Civil Action No. 4584 decided July 31, 1956 ..... 26
*Guaranty Trust Co.* v. *West Virginia Turnpike Comm.*, 109 F. Supp. 286 ..... 8, 23, 24
*Harrison Construction Company* v. *Ohio Turnpike Commission*, 272 F.2d 337 ..... 4, 18, 25
*Herta* v. *Kundson*, 8 Cir., 6 F.2d 812 ..... 21

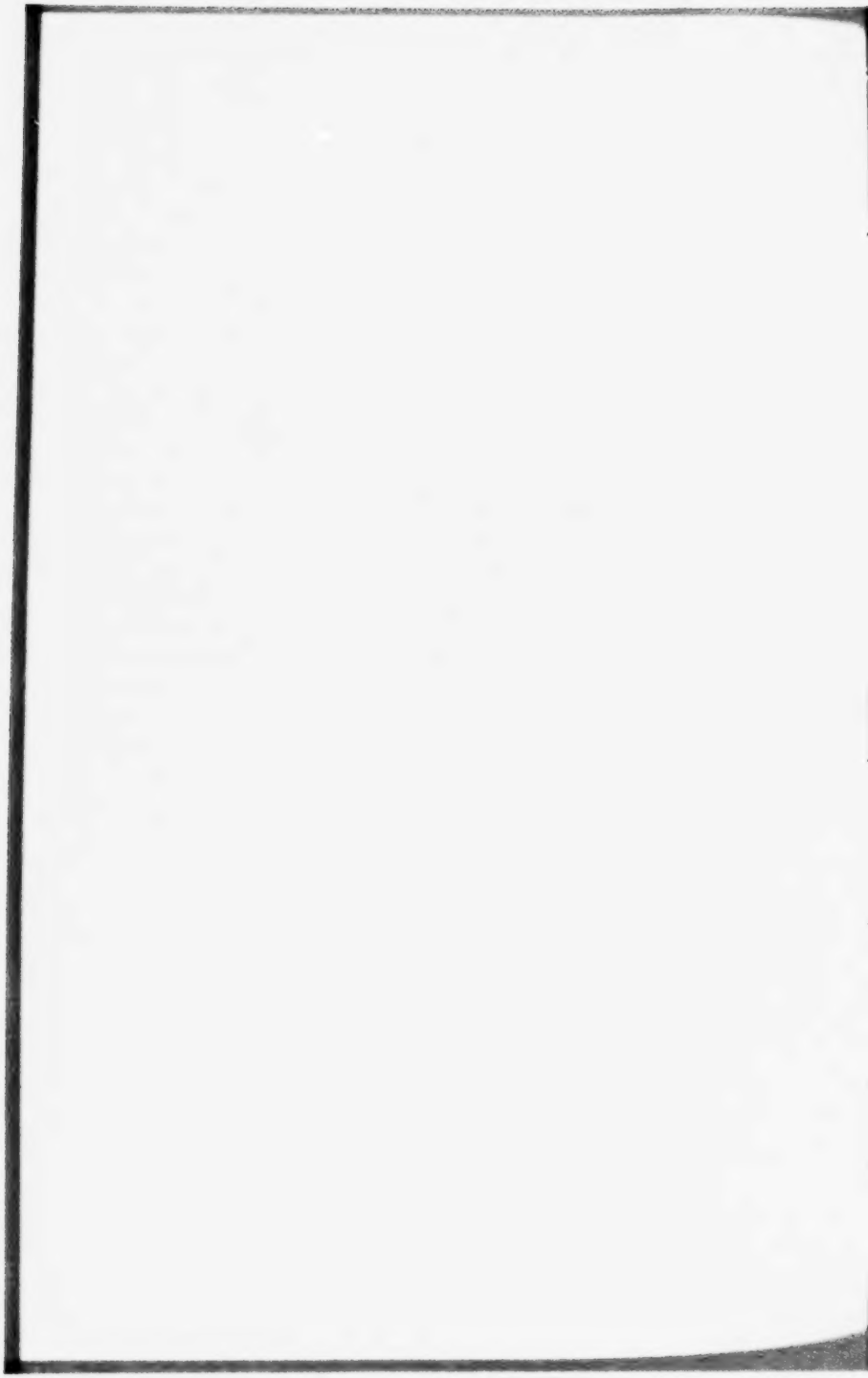
BLEED THROUGH POOR COPY

*Hope Natural Gas Company* v. *West Virginia Turnpike Commission*, (1958) 105 S.E.2d 630 ..... 25
*Hopkins* v. *Clemson Agricultural College of South Carolina*, 1911, 221 U.S. 636, 642, 31 S.Ct. 654, 55 L.Ed. 890 ..... 16
*Hosterman* v. *Kansas Turnpike Authority*, 183 Kan. 590, 331 P.2d 323 ..... 5
*Hunkin-Conkey Construction Co.* v. *Pennsylvania Turnpike Commission*, 34 F. Supp. 26 (1940) ..... 20, 21
*Indiana State Toll Bridge Commission* v. *Minor*, (1957) 236 Ind. 193, 200, 139 N.E.2d 445 ..... 25
*Interstate Construction Co.* v. *Regents of the University of Idaho*, D.C., 199 Fed. 309 ..... 21
*Johnson-Greene Company et al.* v. *Ohio Turnpike Commission*, D.C., W.D., Civil Action No. 7816 decided December 4, 1957 ..... 25
*Johnson* v. *Noble*, (C.C.A.) 64 F.2d 396 ..... 15
*Kansas City Bridge Co.* v. *Alabama State Bridge Corp.*, 5 Cir., 59 F.2d 48 ..... 24
*Keifer and Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381, 59 S. Ct. 516, 83 L. Ed. 784 ..... 5
*Larson* v. *Domestic and Foreign Commerce Corp.*, 1949, 337 U.S. 682, 687, 69 S. Ct. 1457, 93 L. Ed. 1628 ..... 17
*Linger* v. *Pennsylvania Turnpike Commission*, 158 F. Supp. 900, D.C., W.D., Pa., 1958 ..... 16, 23
*Lowes* v. *Pennsylvania Turnpike Commission*, 125 F. Supp. 681 ..... 23
*Masse* v. *Pennsylvania Turnpike Commission*, D.C., E.D., Pa., 1958, 163 F. Supp. 510 ..... 23
*Merrill* v. *Inhabitants of Town of Gray*, (D.C. Maine) 37 F. Supp. 61 ..... 14
*Minnesota* v. *Northern Securities Co.*, 194 U.S. 48, 63, 24 S. Ct. 598, 48 L. Ed. 870 ..... 21
*New Jersey Turnpike Authority* v. *Parsons*, (1949) 69 A.2d 875, 879 ..... 25
*Osborn* v. *United States Bank*, 9 Wheat. 738 ..... 4

*Palatka Water Works Co.* v. *City of Palatka*, Fla. (9 C.C.A. 1903), 127 Fed. 161 ..... 15
*Pennsylvania Turnpike Commission* v. *Welsh*, 3 Cir. 1951, 188 F.2d 447, 450 ..... 16, 17
*People* v. *Illinois State Toll Highway Commission*, (1954) 3 Ill.2d 218, 120 N.E.2d 35 ..... 25
*Pfeferle* v. *Lyon County*, 39 Kan. 432, 18 Pac. 506, at page 436 ..... 12
*Postal Telegraph Cable Co.* v. *Alabama*, 155 U.S. 482, 487, 15 S. Ct. 192, 194, 39 L. Ed. 231 ..... 21
*S. J. Groves & Sons Company* v. *West Virginia Turnpike Commission*, (D.C., S.D., W.Va., 1958) 164 F. Supp. 816, 817 ..... 25
*Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 258 U.S. 549, 567, 42 S. Ct. 386, 388, 66 L. Ed. 762 ..... 5
*Smith* v. *Higgins*, 149 Kan. 477, 87 P.2d 544, at page 479 ..... 13, 14
*Smith* v. *Reeves*, 178 U.S. 436 ..... 19
*South Carolina Public Service Authority* v. *New York Casualty Co.*, 74 F. Supp. 831 ..... 26
*Stamey* v. *Kansas Highway Commission*, 76 F. Supp. 946 ..... 5
*State ex rel. Highway Commission* v. *Bates*, 317 Mo. 696, 296 S.W. 418 ..... 25
*State ex rel.* v. *State Highway Commission*, 138 Kan. 913 ..... 10, 12
*State Highway Commission* v. *Utah Construction Company*, 273 U.S. 194, at 200, 49 S. Ct. 104, 73 L. Ed. 262 21
*State Highway Commission* v. *Utah Construction Co.*, 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262 15-16, 19, 20
*State of Minnesota* v. *Hitchcock*, 1902, 185 U.S. 373, 386, 22 S. Ct. 650, 46 L. Ed. 954 ..... 17
*State of Oklahoma* v. *Oklahoma Natural Gas Corp.*, 83 F.2d 986 (1936) ..... 15
*State* v. *State Highway Commission*, 139 Kan., Page 394 ..... 10

BLEED THROUGH POOR COPY

*Taylor* v. *New Jersey Highway Authority*, (1956) 22 N.J. 454, 126 A.2d 313, 322 ..... 25
*Thomas* v. *Ellis County*, 91 Kan. 443, at page 445 ..... 13
*United States* v. *Lee*, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171 ..... 5
*Utah Construction Co.* v. *State Highway Commission*, D.C., 16 F.2d 322 ..... 21
*Wheeler* v. *City of Chicago*, (C.C.A. 1895) 68 Fed. 526 15
*Wommack* v. *Lesh*, 180 Kan. 548, 305 P.2d 854 ..... 13



BLEED THROUGH POOR COPY

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19....

No. .....

THE KANSAS TURNPIKE AUTHORITY,
*Petitioner,*

vs.

EDWIN JOHN ABRAMSON and EMMETT JOHNS,
Executors of the Estate of JOHN P. ABRAMSON,
*Respondents.*

## REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

### STATEMENT.

Brief reference will be made to the statements set forth under the heading "Statement" contained in the petition filed herein by Petitioner.

Petitioner states that the Kansas Turnpike Authority was created "as an instrumentality and governmental department of the State of Kansas * * *". This is not a correct statement of law although such a statement might

properly be made if offered for the purposes of argument. The act creating the Kansas Turnpike Authority does not designate it as a "governmental department." In fact, it specifically creates a separate and distinct "body politic and corporate" rather than a department of the State of Kansas (See 68-2003, G.S., 1959 Supp., App. A1).

Petitioner also states that the Tenth Circuit Court of Appeals held, among other things, "That the rains which destroyed the original compaction were unusual rains." A comment is then added in the footnotes that this was a finding of fact made in the first instance by the Circuit Court.

We submit that no such "finding of fact" was made by the Circuit Court. The Circuit Court, in discussing Section 18 of the Standard Specifications, commented that no one contended the rains which fell from September 22 to October 5 were ordinary for that time and place. It is patently erroneous to contend such comment constitutes or was intended to constitute a finding of fact. Furthermore, such comment had no bearing upon the decision rendered.

## QUESTIONS PRESENTED.

Attention is first invited to the two statements set forth by petitioner under this heading.

We suggest that Petitioner's statement of the first question clearly demonstrates the unsoundness of Petitioner's position in this law suit. This statement overlooks the clear language of the Eleventh Amendment to the Constitution of the United States. The prohibition with which we are concerned is not an action against "state governmental agencies carrying on essential governmental func-

BLEED THROUGH POOR COPY

tions" but rather actions "against one of the United States."

In other words, the controversy is whether the Kansas Turnpike Authority is the State of Kansas—not whether this action is against some other agency bearing a relationship to the State of Kansas.

Although we do not feel that the issue presented by Petitioner in the second question is such a question as will command the attention of the United States Supreme Court we do point out that the question is argumentative as set forth by Petitioner and assumes as true several matters that were in dispute during the trial of this action, and which were determined in favor of Respondent by virtue of the judgment rendered by the trial court and affirmed by the Tenth Circuit Court of Appeals.

## ARGUMENT.

### QUESTION I.

**Do special and important reasons exist for the granting of a review on writ of certiorari in this case?**

We have carefully examined the provisions of Section 5, Rule 38 of the Supreme Court Rules setting forth the situations in which a writ of certiorari will be granted.

We note the provisions that the writ will be granted only when there are special and important reasons therefor.

We also note the character of reasons set forth in Section 5(b) of this rule.

We submit that no special nor important reasons exist in this case and that none of the situations spelled out in Section 5(b) are here present.

The decision in this case is not in conflict with the decisions of any Circuit Court of Appeals. In fact this decision of the Tenth Circuit Court of Appeals is squarely in point with the case of *Harrison Construction Company* v. *Ohio Turnpike Commission,* No. 13,779 U. S. Circuit Court of Appeals for the Sixth Circuit, decided December 3, 1959, and cited by Petitioner as 272 F.2d 337. Rarely do we find a case so completely indistinguishable as is true of the *Harrison Construction Company* v. *Ohio Turnpike Commission* case and the case at bar.

Nor does the decision in this case decide an important question of local law in a way probably in conflict with applicable local decisions. Although several decisions of the Kansas Supreme Court have discussed the act creating the Kansas Turnpike Authority none of these decisions has decided, or even given consideration to, the question of whether the Kansas Turnpike Authority is the State of Kansas and thereby within the provisions of the Eleventh Amendment to the Constitution of the United States.

QUESTION II.

**Is the Kansas Turnpike Authority a "citizen" within the meaning of the diversity of citizenship provisions of Section 1332, U.S.C.A., Title 28, or is the Kansas Turnpike Authority "one of the United States" within the meaning of the Eleventh Amendment to the Constitution of the United States?**

A brief statement of the applicable rule is as follows:

The State of Kansas, and the State alone, not the agents, instrumentalities or subdivisions of the State, is held *not* to be a "citizen" within the meaning of Section 32, 28 U.S.C.A.

*Osborn* v. *United States Bank,* 9 Wheat. 738.

BLEED THROUGH POOR COPY

*United States* v. *Lee*, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171.

*Sloan Shipyards Corporation* v. *United States Shipping Board Emergency Fleet Corporation*, 258 U.S. 549, 567, 42 S.Ct. 386, 388, 66 L.Ed. 762.

*Keifer and Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381, 59 S.Ct. 516, 83 L.Ed. 784.

The Authority appears to base its argument primarily upon two points.

1. That the *Kansas State Highway Commission* has been judicially determined to be the State of Kansas, and not a "citizen" within the meaning of Section 1332, 28 U.S.C.A. (*Stamey* v. *Kansas Highway Commission*, 76 F. Supp. 946; *Dunnuck* v. *Kansas Highway Commission*, 21 F. Supp. 882); therefore, they contend, the *Kansas Turnpike Authority* is not a "citizen."

2. That the Supreme Court of Kansas has held that the Kansas Turnpike Authority is an *arm* of the State of Kansas (*Hosterman* v. *Kansas Turnpike Authority*, 183 Kan. 590, 331 P.2d 323; *Anderson Cattle Company* v. *Kansas Turnpike Authority*, 180 Kan. 749, 308 P.2d 172); therefore, they contend, it is not a "citizen."

We shall consider these points in the order set out above.

An examination of the provisions of the Kansas Turnpike Act discloses the following:

(a) Although it has been established (*Stamey* v. *State Highway Commission of Kansas*, 76 F. Supp. 946, *Dunnuck* v. *Kansas State Highway Commission*, 21 F. Supp. 882) that the State Highway Commission of Kansas is the State of Kansas, the Kansas Turnpike Authority

is required to repay the State Highway Commission for all money and services received from it (G.S., 1957 Supp., 68-2021 and 2022, App. A6-A7). And the State Highway Commission and Kansas Turnpike Authority are authorized to contract with each other for personnel, equipment and engineering work (G.S., 1957 Supp., 68-2021, App. A6).

(b) The Authority is authorized to issue revenue bonds "of the Authority," not of the State of Kansas, and such bonds must be paid exclusively from the revenues of the Authority and not from funds of the State of Kansas (G.S., 1957 Supp., 68-2002, 2004 and 2007, App. A1, A2, A3).

(c) Bonds issued by the Authority shall not constitute a debt of the State or a pledge of the faith and credit of the State (G.S., 1957 Supp., 68-2008, App. A3).

(d) The turnpike could not be constructed until it was determined that the project would be entirely self-liquidating and could be financed wholly through the investment of *private funds* (G.S., 1957 Supp., 68-2002, App. A1).

(e) The Authority is a corporation, created as a body politic and corporate, and has been granted many of the powers granted by statute to private corporations such as the power to adopt by laws, adopt an official seal (rather than to use the seal of the State of Kansas), and to sue and be sued in its own name, plead and be impleaded (G.S., 1957 Supp., 68-2003, 2004, 2007, App. A1, A2, A3).

(f) The Authority has exclusive control over the amount of tolls to be charged, the employment of all employees and agents, and is authorized to make and enter into all contracts and agreements necessary to the exercise of its powers; and in the exercise of these powers the

BLEED THROUGH POOR COPY

Authority is not subject to the supervision or regulation of any commission, board, bureau, official or agency of the State of Kansas (G.S., 1957 Supp., 68-2004, 2009, 2019, App. A2, A4, A6).

(g) The Authority is authorized to acquire, hold and dispose of real and personal property (G.S., 1957 Supp., 68-2004, App. A2).

(h) The bonds of the Authority may be issued without obtaining the consent of any department, division, commission, board, bureau or agency of the State, and without regard to the general bond laws of Kansas (G.S., 1957 Supp., 68-2007, 2019, App. A3, A6).

(i) Revenues received by the Authority "shall be deemed trust funds" for the benefit of the bondholders, *and do not become State funds* (G.S., 1957 Supp., 68-2011, App. A5).

(j) The Authority is authorized to enter into a trust agreement with a commercial trust company for the protection of the bondholders who furnish the private capital, and such bondholders are authorized to bring an action under the trust agreement to protect their interest (G.S., 1957 Supp., 68-2010, 2012, App. A5).

(k) The Authority is required *to provide and pay for* the policing of the turnpike (G.S., 1957 Supp., 68-2025, App. A7).

(l) The liability of the Authority for its acts is extended beyond the rules of common law negligence (G.S., 1957 Supp., 68-2015, App. A5).

These provisions demonstrate beyond question that the Legislature did not want the State of Kansas to construct the proposed turnpike. It is seen that there was a

studied effort to divorce the Authority from the State of Kansas in every possible way.

This position was stated as follows in *Guaranty Trust Co. v. West Virginia Turnpike Comm.*, 109 F. Supp. 286, where it was said:

> "By the West Virginia act, as by the Pennsylvania act, the Legislature clearly intended to divorce the Turnpike Commission as fully as possible from any identity with the State, while giving it all the functions which are necessary and essential to the accomplishment of its purposes."

If the State of Kansas desired to construct and operate a turnpike, why did it not do so through the state highway commission, the department of the State Government created for the sole purpose of constructing, operating and maintaining the highways of Kansas? We think it is clear that the State of Kansas did not want in any manner or to any degree to incur any responsibility or financial liability for this project. It thought the building of the turnpike advisable and in the best interests of the people of Kansas, if, but only if, it could be accomplished by a separate, distinct, corporate entity. The Legislature was willing to create such an entity and made concessions with respect to the payment of taxes. *In doing so, however, the Legislature saturated its enactment with frequent and unmistakable guards against the involvement of the State of Kansas.*

What similarity is there, therefore, between the Authority the Kansas Highway Commission?

The State Highway Commission of Kansas is created in the same manner and with the same general powers as any other commission of Kansas (G.S. 1949, 74-2001, App. A8). It is strictly a department of the government

BLEED THROUGH POOR COPY

of Kansas. It is financed entirely by funds provided by taxation. The Legislature of Kansas appropriates every penny that the Commission spends. Its funds are public funds and are in the custody and control of the State Treasurer until the Kansas Legislature directs a transfer of these funds, whereas the funds of the Authority are maintained in banks designated by the Authority with the approval of the trustee. The Highway Commission is governed by the budget laws and cash basis laws of Kansas whereas the trust agreement controls the spending procedure of the Authority. The selection of the employees of the Authority is solely within the judgment and discretion of the governing body of the Authority, whereas the State Highway Commission must abide by the civil service procedures applicable to all state employees. The Attorney General of Kansas provides the Highway Commission with its attorney, whereas the Authority engages a private attorney (G.S. 1949, 74-2006, App. A8).

This list of differences between the Highway Commission of Kansas and the Authority could be extended but no purpose would be served by doing so. *It is crystal clear that in creating the Authority, the State of Kansas took every conceivable precaution to make certain it did not get into the turnpike business.*

It has been pointed out that the Turnpike Act exempts the Authority from the payment of taxes. We answer this by saying that if the Legislature considered or intended that the property acquired by the Authority was to become the property of the State of Kansas, it would not have been necessary to take legislative action to create the exemption. It was stated in *Darby* v. *L. G. DeFelice & Son*, 94 F. Supp. 535:

"Had the State Legislature regarded the Commission as the Commonwealth itself, it would have been utterly superfluous to give an express tax exemption."

The Court, in *State ex rel.* v. *State Highway Commission*, 138 Kan. 913, in describing the Highway Commission of Kansas, stated: "The state highway commission is therefore acting for the state in all of its activities authorized by statute for the construction and maintenance of state highways. The funds which it uses for that purpose are *state funds, and the warrants it draws on the fund are state warrants*, payable, however, from the fund, and are general as they apply to this fund." (Emphasis added).

We believe it fair to conclude that a comparison of the Highway Commission of Kansas and the Authority demonstrates persuasively the clear and controlling differences and dissimilarity between these two bodies.

Petitioner attempts to nullify the effect of the many sharp and distinguishing differences between the Kansas State Highway Commission and the Kansas Turnpike Authority by asserting that the funds used to support the Kansas State Highway Commission are not public funds, and are not appropriated by the Kansas Legislature.

These funds are, of course, state funds or public funds. They are raised by special taxes levied by the state legislature on motor vehicles and motor fuels and can be used only for the purpose of constructing a state system of public highways (*State* v. *State Highway Commission*, 139 Kan.. Page 394; *State* v. *State Highway Commission, supra*).

The funds so raised are then deposited with the State Treasurer of Kansas and remain with him until they are appropriated by the Kansas Legislature.

BLEED THROUGH POOR COPY

As an example of the manner in which State Highway funds are appropriated, attention is called to Chapter 15, Laws of Kansas, 1959 (which was the last general session of the Kansas Legislature). This act is entitled "An Act making appropriations for the fiscal year 1960 for the operation, maintenance, support and functioning of activities and for improvement of the state highway commission; authorizing the fixing of salaries; restricting the expenditures of certain funds and authorizing appeals connected therewith; and reappropriating unencumbered balances as of June 30, 1959, for the fiscal year ending June 30, 1960."

It then continues: "Section 1. There is hereby appropriated out of the following special revenue funds * * *" and then section 2 sets forth the appropriations to the "State Highway Commission" for each of the various functions of the State Highway Commission.

See also Section 33, Chapter 11, Laws of Kansas, 1959, whereby the legislature increases the limitation of the total expenditures for the motor vehicle registration activity of the State Highway Commission, and specifies the amounts that can be spent by the highway commission for salary, wages and other operating expenses in connection with the motor vehicle registration. See Chapter 40, Laws of Kansas, 1959, directing the State Treasurer to transfer funds from the Highway Fund to the General Fund for cost of operation of the Motor Vehicle Reciprocity Commission.

There are numerous other instances in which the Kansas Legislature has appropriated funds from the Highway Fund for use by the State Highway Commission. In fact, we know of no instance in which highway funds have been spent by the State Highway Commission without such funds having first been appropriated by the Kansas Legislature.

The Authority then points to certain language used by our Supreme Court (which is actually dictum) and concludes that this language determines that the Authority is the State of Kansas (*Anderson Cattle Co.* v. *Kansas Turnpike Authority, supra; State ex rel.* v. *Kansas Turnpike Authority, supra*).

In each of these cases, the Kansas Supreme Court used the term "arm" of the State in referring to the Authority. In neither case did our Court judicially determine that the Authority was an "arm" of the State. The Court merely stated in one of the cases that the Legislature had power to create an "arm of the State", and in the other case a somewhat similar reference was made to the Authority.

It apparently is the use of the term "arm of the State" that renders comfort to the Petitioner. There is, however, no such comfort to be found from the use of this term.

The Petitioner also points to the legislative language describing the Authority as having been "created a body politic and corporate" and "constituted a public instrumentality".

If we were to agree that the Authority was an "arm of the State" and a "public instrumentality" it would not be of help to the Petitioner. The Supreme Court of Kansas has consistently held throughout its existence that the counties, cities, drainage districts and townships of Kansas *are political subdivisions of the State of Kansas, are instrumentalities of the State government, and are arms of the State.*

The Supreme Court of Kansas said in *Pfeferle* v. *Lyon County*, 39 Kan. 432, 18 Pac. 506, at page 436:

> "Counties are principally mere *political subdivisions of the state, mere instrumentalities of the state*

BLEED THROUGH POOR COPY

> *government,* brought into existence merely for the purpose of aiding and assisting the state in promoting justice, in preserving peace, quiet and good order in the state, and of promoting the welfare and happiness of the citizens thereof; * * *." (Emphasis added).

A county was defined as an *arm of the state* government in 20 C.J.S. 754:

> "A county is but an agency or *arm* of the state government, created, organized, and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state, and as a matter of public convenience in the administration of the government. It is generally a subordinate part of the sovereignty of the state itself, and is not an independent governmental entity." (Emphasis added).

A recent Kansas case defining a county as an *arm* of the state is *Wommack* v. *Lesh,* 180 Kan. 548, 305 P.2d 854, where it was said:

> "Furthermore, it is well settled that a county is an *arm or agent of the state,* set up to perform certain governmental and political functions as such; * * *" (Emphasis added).

Also see *Smith* v. *Higgins,* 149 Kan. 477, 87 P.2d 544, at page 479:

> "It is an *arm and agent* of the state set up to perform certain governmental and political functions." (Emphasis added).

In *Thomas* v. *Ellis County,* 91 Kan. 443, at page 445, the Court said:

> "* * * counties are mere auxiliary agents of the state." (Emphasis added).

A township is likewise an *agency of the state* created by the state.

See *Deerhead Township* v. *Fritz*, 152 Kan. 110, 102 P.2d 1035, at page 114:

> "A township is a political subdivision of the state. It is well established that being an *arm of the state*, it is not liable in actions for tort unless such liability is clearly imposed by statute (Smith v. Higgins, 149 Kan. 477, 479, 87 P.2d 544, and cases there cited; Eikenberry v. Township of Bazaar, 22 Kan. 556; Fisher v. Township, 87 Kan. 674, 125 Pac. 94; Arnold v. Coffey County Comm'rs, 131 Kan. 343, 291 Pac. 762)." (Emphasis added).

The language of Section 3 of the Kansas Turnpike Authority Act, creating the Authority as "a body politic and corporate" and further providing in Section 4 that the Authority may "sue and be sued in its own name, plead and implead and make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act," *corresponds and is similar to the creation of counties, townships and cities by the legislature of the State as separate corporate entities performing duties as governmental instrumentalities.*

*Counties are subject to suit in the federal courts upon their contracts.*

*A township is subject to suit upon its contracts in federal courts* and such courts have jurisdiction of suits against the township upon its contracts.

> *Merrill* v. *Inhabitants of Town of Gray*, (D.C., Maine) 37 F. Supp. 61.

BLEED THROUGH POOR COPY

*A city is subject to suit upon its contracts in the federal courts* and the federal courts have jurisdiction of actions on contracts against a city.

*Wheeler* v. *City of Chicago,* (C.C.A. 1895), 68 Fed. 526.

*Palatka Water Works Co.* v. *City of Palatka,* Fla. (9 C.C.A. 1903), 127 Fed. 161.

*Camden Interstate R. Co.* v. *Catlettsburg,* Ky. (C.C.A. 1904), 129 Fed. 421.

3.52 Encyclopedia of Federal Procedures, Vol. 2, p. 256; reads in part as follows:

> "Though a state is not regarded as a citizen within the purview of the removal acts, it is otherwise with municipal or political corporations. These are organized under the laws of the state for political purposes and come within the rule as to private corporations, and, being like the latter created by the laws of the state, are for purposes of removal citizens of that state. A county, being a municipality of the state, is a citizen of the state within the meaning of the Act. The same is true of a school district, which is a political subdivision of the state and a body corporate or quasi-corporate, authorized by the laws creating it to contract and sue in its own name."

The Tenth Circuit in the case of *State of Oklahoma* v. *Oklahoma Natural Gas Corp.*, 83 F.2d 986 (1936), in holding that a case was properly removed to the Federal Court passed upon the citizenship of the City of Tulsa. The Court said, l.c. 988:

> "In order to authorize removal on the ground of diverse citizenship alone, all parties on one side, except mere nominal parties, must be citizens of a different state from all parties on the other side. Johnson v. Noble, (C.C.A.) 64 F.2d 396. And a state is not a citizen for the purpose of constituting the requisite diversity. State Highway Commission v. Utah Con-

> struction Co., 278 U.S. 194, 49 S.Ct. 104, 73 L.Ed. 262; Ex parte State of Oklahoma, (C.C.A.) 37 F.2d 862, Cargile v. New York Trust Co., (C.C.A.) 67 P.2d 585. *But a municipal subdivision of the state, such as a county, city, town, or school district, having a separate corporate entity, is a citizen for that purpose.*" (Emphasis added).

We have demonstrated that the designation of the Authority as an "arm of the state" and "a public instrumentality" is not of help to the Authority in this action. *It places the Authority in the same category with counties, cities, townships, drainage districts, and school districts, all of which are "arms of the state" and "public instrumentalities", and all of which are "citizens" within the diversity of citizenship provisions of the federal code.*

The controlling consideration in determining whether the Authority is the State of Kansas is: *who is the real party in interest in this action?*

Although the rule of law has been stated many times by courts throughout the United States, a recent statement appears in *Linger* v. *Pennsylvania Turnpike Commission,* 158 F. Supp. 900, D.C. W.D. Pa. 1958, where it was said:

> "Judge Hastie has noted in Pennsylvania Turnpike Commission v. Welsh, 3 Cir. 1951, 188 F.2d 447, 450, that the Eleventh Amendment's prohibition of suits against the state extends to situations where the state, though not the party named, is the real party in interest. Hopkins v. Clemson Agricultural College of South Carolina, 1911, 221 U.S. 636, 642, 31 S.Ct. 654, 55 L.Ed. 890. And whether the state rather than its instrumentality is the real party in interest may be determined by analysis of the various attributes and limitations with which the latter has been endowed.

BLEED THROUGH POOR COPY

Pennsylvania Turnpike Commission v. Welsh, supra; cf. 81 C.J.S. states § 131 (1953)."

* * *

"One of the crucial questions involved in determining whether the state is the real party in interest is whether the relief sought is relief against the sovereign. Cf. State of Minnesota v. Hitchcock, 1902, 185 U.S. 373, 386, 22 S. Ct. 650, 46 L.Ed. 954; Larson v. Domestic and Foreign Commerce Corp., 1949, 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L. Ed. 1628. The plaintiff seeks a judgment for money damages and a judgment if entered will bind only the Pennsylvania Turnpike Commission. The Commonwealth of Pennsylvania has by statute insulated its treasury from the obligations of the Turnpike Commission."

* * *

"The Commonwealth obviously has an interest in the Turnpike. But its interest is *prospective*. It has chosen to delegate governmental power to an instrumentality which exercises independent authority and has independent financial responsibility. *The Commission and not the state has a direct and independent interest in the result of this action.*" (Emphasis added).

As stated in the above opinion, the interest of the State of Kansas in the outcome of this legislation is *prospective*. The parties principally concerned—those who have the real interest in the outcome of this lawsuit—are the corporate Turnpike Authority and those who have invested their private funds in the bonds of the Authority. It is true that at some distant time the Turnpike *might* become a part of the State Highway System of Kansas. Section 17 of the Turnpike Act (G.S., 1957 Supp., 68-2017, App. A6), provides that at such time as all indebtedness of the project has been provided for "such project, *if then in good condition and repair*, shall become a part of the state highway system and shall thereafter be maintained by the State Highway Commission." (Emphasis added).

Such *prospective* interest that the State of Kansas may have in the turnpike is dependent upon two things: first, the turnpike must prove to be sufficiently profitable that it will produce adequate revenue with which to pay the cost of operation and maintenance, and sufficient with which to pay the principal and interest on the bonds held by the private investors; and secondly, that when those conditions have been met, the turnpike itself must then be in good condition and repair.

It is perhaps true that the State has an interest of sorts but we are reminded that not one penny of any judgment rendered against the Authority and paid by it will be paid from the funds of the State of Kansas. *We readily see that the real party in interest is the Authority and its investors.* It is not enough that the State of Kansas may have some future interest. *It must be the real party in interest at the present time.*

The "real party in interest rule" was discussed in *Harrison Construction Company* v. *Ohio Turnpike Commission, supra,* as follows: "It is apparent that the Legislature very carefully immunized the treasury of the state from any obligations whatever arising out of the creation of the turnpike commission or any projects which it might undertake.

The question as to whether or not the state is the real party in interest must be 'determined by the essential nature and effect of the proceeding as it appears from the entire record.'

* * *

This action will not and cannot in any way affect the Treasury of the State of Ohio. That is a test of whether or not a suit is against the state. In *Ford Motor Co.* v. *Department of Treasury of Indiana et al, supra,* the Court said at

BLEED THROUGH POOR COPY

p. 463, 'The action is against the state's department of treasury,' and at p. 464, '*And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.*'"

In *Smith* v. *Reeves*, 178 U.S. 436, it was held that the suit was one against the State of California. At pp. 438-9 it was said, "Although the State, as such, is not made a party defendant, the suit is against one of its officers as Treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint." (Emphasis added).

*State Highway Commission* v. *Utah Construction Co.*, 278 U.S. 194, 49 S. Ct. 104, 73 L. Ed. 262, was cited by the Authority in support of their position. This case is clearly distinguishable. Here the contract involved in the action was actually with the State of Utah and the State itself was directly and immediately obligated. Any judgment rendered by the Court would have been paid by the State of Utah from public funds. The Court stated:

> "* * * the Commission is the sole defendant, *it has no property, no power of taxation, no means of discharging a judgment should one be recovered against it.* In that event, it will be entirely optional with the State as to what, if anything, it will do in the premises. * * *" (Emphasis added).

Certainly that is not the situation in the case at bar.

This case was also distinguished in *Harrison Construction Company* v. *Utah Turnpike Commission, supra,* where it was said:

> "*State Highway Commission of Wyoming* v. *Utah Construction Co.,* 278 U.S. 194, is cited as the leading case in support of appellee's contention. This case is readily distinguishable from the pending case. The highway fund was in the custody and keeping of the state treasurer and all roads constructed were financed from the state highway fund at the expense of the state. At p. 199, the Court said, 'The State, acting through the Highway Commission, as it might through any officer, became a party to the original agreement and *obligated herself thereby.* Neither the Commission nor any of its members assumed any direct or personal responsibility. * * * *The Commission was* but the arm or alter ego of the State *with no funds* or ability to respond in damages. (Emphasis added.) Applying the basic test of the Ford case above cited, it is apparent that the action was against the State of Wyoming."

A case on all fours with the one at bar is *Hunkin-Conkey Construction Co.* v. *Pennsylvania Turnpike Commission,* 34 F. Supp. 26 (1940), where it was held that the Pennsylvania Turnpike Commission was distinct and separate from the state and was a citizen thereof for the purpose of establishing federal jurisdiction based upon diversity of citizenship. The Court said, l.c. 27:

> "The Eleventh Amendment provides that 'the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.' This amendment has frequently been before the courts and it is well settled that the immunity therein granted may be waived by the State. In this case, the Commission is authorized to

BLEED THROUGH POOR COPY

sue and be sued. This general provision constitutes a waiver by the State, if the State is the real party in interest, of its immunity from suit. Utah Construction Co. v. State Highway Commission, D.C., 16 F.2d 322; Interstate Construction Co. v. Regents of the University of Idaho, D.C., 199 F. 309; Hertz v. Knudson, 8 Cir., 6 F.2d 812. However, as shall be shown later, it is my conclusion that the State is not the real party defendant."

"The basis for jurisdiction of this court relied upon by plaintiff, aside from the amount in controversy, is the alleged diversity of citizenship of the parties. If the Commission is not a legal entity distinct from the State, the motion to dismiss must be granted, for 'A state is not a citizen. And, under the judiciary acts of the United States it is well settled that a suit between a state and a citizen or a corporation of another state is not between citizens of different states, and that the circuit court of the United States has no jurisdiction of it, unless it arises under the constitution, laws, or treaties of the United States.' Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 487, 15 S. Ct. 192, 194, 39 L. Ed. 231; Minnesota v. Northern Securities Co., 194 U.S. 48, 63, 24 S. Ct. 598, 48 L. Ed. 870; State Highway Commission v. Utah Construction Company, 273 U.S. 194, at 200, 49 S. Ct. 104, 73 L. Ed. 262."

The Court after pointing out that the Act creating the commission constituted it "an instrumentality of the Commonwealth and the exercise of its powers * * * shall be deemed and held to be an essential governmental function of the Commonwealth," said l.c. 28:

"This provision, if taken alone, sheds little light upon the question of whether or not the Commission is in fact the alter ego of the State. However, the other provisions of the act, when considered in conjunction with this section, clearly indicate that the

Commission is distinct and separate from the State and is in reality a citizen thereof. *The act provides that the entire cost of the turnpike shall be paid in the first instance from a fund which is to be raised by the issuance and sale of bonds,* and that the 'turnpike revenue bonds issued under the provisions of this act shall not be deemed to be a debt of the Commonwealth or a pledge of the faith and credit of the Commonwealth, but such bonds shall be payable exclusively from the fund herein provided therefor from tolls', Section 2, 36 P.S. Pa. § 652b; that *the Commission shall have the power to enter into contracts, take title to property, employ engineers, architects, inspectors, and attorneys* and such other employees' as may be necessary in its judgment, and fix their compensation; § 4 (subject to the proviso that all contracts and agreements relating to the construction of the turnpike must be approved by the Department of Highways and the construction shall be under the supervision of the Department of Highways); that, upon completion of the turnpike, the Commission shall fix the amount of the tolls and employ men to collect them and provide for the maintenance of the turnpike; that, *upon retirement of the bonds* or provision therefor, the Commission shall be dissolved *and the turnpike shall become a part of the system of state highways.*"

"From the provisions of the act, as above outlined, it is clear that the Commonwealth of Pennsylvania has so divorced the defendant Commission from the State that *this action is one against a legal entity distinct from the State,* and the State itself is only indirectly interested in the turnpike." (Emphasis added.)

The federal courts in Pennsylvania have on several occasions more recently held the Turnpike Commission of that state be a separate and legal entity subject to suit in the federal court. See *Darby* v. *DeFelice & Son, supra;*

BLEED THROUGH POOR COPY

*Lowes* v. *Pennsylvania Turnpike Commission*, 125 F. Supp. 681; *Linger* v. *Pennsylvania Turnpike Commission, supra; Masse* v. *Pennsylvania Turnpike Commission*, D.C. E.D. Pa. 1958, 163 F. Supp. 510.

The West Virginia Turnpike Commission has also been ruled to be a citizen of the state of West Virginia for the purposes of federal jurisdiction. In *Guaranty Trust Co.* v. *West Virginia Turnpike Comm.*, 109 F. Supp. 286 (1952), suit was for the purpose of determining the authority of the defendant to construct a proposed highway. In determining that there was a diversity of citizenship the Court said, l.c. 292:

> "This is not an action against the State of West Virginia. If it were the court would clearly be without jurisdiction to entertain it. * * *"
>
> * * *
>
> "It is true that the act creating the Turnpike Commission contains the statement *that it is constituted an agency of the State, and that the exercise of its powers shall be deemed and held to be an essential governmental function of the State.* * * * The West Virginia Turnpike Commission was given no power to incur any liability on behalf of the State. No funds of the State are used by the Commission for any purpose. The bonds are not a pledge of the faith and credit of the State, but are payable exclusively from revenue produced from the operation of the turnpike. The Commission makes its own contracts and employs and fixes the compensation of its own personnel. The only noticeable differences between the West Virginia Act and that of Pennsylvania, 36 P.E. § 652a et seq., creating the respective turnpike commissions are, that in the West Virginia act the Commission is termed an 'agency' of the state and in Pennsylvania it is named as an 'instrumentality of the Commonwealth'; the West Virginia act requires the Commission to take title to lands in the name of the state, whereas, the

Pennsylvania act permits the Commission to take title in its own name; and in the West Virginia act the Commission was created for the purpose of constructing turnpikes generally, and therefore is not to go out of existence when the bonds issued for the present project have been paid; whereas, the Pennsylvania act provided for the dissolution of the Commission on retirement of the turnpike revenue bonds. In Pennsylvania the members of the Commission are paid salaries out of revenues derived from tolls; in West Virginia they serve without compensation. These differences are, in my opinion, unsubstantial and have no bearing on the question presented. *By the West Virginia act, as by the Pennsylvania act, the Legislature clearly intended to divorce the Turnpike Commission as fully as possible from any identity with the State, while giving it all the functions which are necessary and essential to the accomplishment of its purposes.* Fowler v. California Toll Bridge Authority, 9 Cir., 128 F.2d 549, and Kansas City Bridge Co. v. Alabama State Bridge Corp., 5 Cir., 59 F.2d 48, among the cases holding similar appointive boards or commissions to be arms of the state and therefore immune from suit, are found upon examination to turn upon circumstances of state control, function, power or interest which are not present among the attributes of the West Virginia Turnpike Commission." (Emphasis added.)

We would extend this argument unduly to comment upon the many decisions of our federal and state courts in which a Turnpike Authority or Commission has been held to be a separate and distinct entity and a "citizen" for the purposes of Federal jurisdiction. We do, however, set forth a number of these authorities.

*West Virginia Turnpike Act*:

*Guaranty Trust Company* v. *West Virginia Turnpike Commission, supra.*

BLEED THROUGH POOR COPY

*S. J. Groves & Sons Company* v. *West Virginia Turnpike Commission*, (D.C., S.D., W.Va., 1958), 164 F. Supp. 816, 817.

*Hope Natural Gas Company* v. *West Virginia Turnpike Commission*, (1958), 105 S.E.2d 630.

*Illinois State Toll Highway Act*:

*People* v. *Illinois State Toll Highway Commission*, (1954), 3 Ill. 2d 218, 120 N.E.2d 35.

*Indiana State Toll-Bridge Commission*:

*Indiana State Toll-Bridge Commission* v. *Minor*, (1957), 236 Ind. 193, 200, 139 N.E.2d 445.

*The New Jersey Highway Authority*:

*Taylor* v. *New Jersey Highway Authority*, (1956), 22 N.J. 454, 126 A.2d 313, 322.

*New Jersey Turnpike Authority* v. *Parsons*, (1949), 69 A.2d 875, 879.

*Missouri State Highway Commission*:

*State ex rel. Highway Commission* v. *Bates*, 317 Mo. 696, 296 S.W. 418.

*Michigan Turnpike Authority*:

*City of Dearborn* v. *Michigan Turnpike Authority*, 1955 73 N.W.2d 344.

*Ohio Turnpike Commission*:

*S. J. Groves & Sons Company* v. *Ohio Turnpike Commission*, D.C., W.D., Civil Action No. 7783, decided December 27, 1957.

*Harrison Construction Company* v. *Ohio Turnpike Commission*, 272 F.2d 337, decided December 3, 1959.

*Johnson-Greene Company et al.* v. *Ohio Turnpike Commission*, D.C., W.D., Civil Action No. 7816 decided December 4, 1957.

*George Vang, Inc.*, v. *Ohio Turnpike Commission*, D.C., E.D. being Civil Action No. 4584 decided July 31, 1956.

*Maine Turnpike Authority*:

*In re Opinion of Justices*, 80 A.2d 417.

*South Carolina Public Service Authority*:

*South Carolina Public Service Authority* v. *New York Casualty Co.*, 74 F. Supp. 831.

An excellent annotation appears at 147 A.L.R. 786 concerning this subject. A number of the cases cited above are discussed in this annotation. Particular attention is given to the "real party in interest rule."

The Authority cites the case of *Florida Turnpike Authority* v. *Van Kirk*, 146 F. Supp. 364, as authority for its contention that the Authority is not a "citizen." Upon careful reading of this case, it is readily distinguishable from the case at bar. The Court, in explaining its decision, stated:

> "In arriving at this conclusion the Court is aware that there are cases bearing on both sides of this controversy, but it is the opinion of this Court that in Florida there can be little or no question but that the Florida Turnpike Authority is definitely a part of the State and is the alter ego of the State because (1) the Legislature has so stated; (2) the Legislature has also stated that this board is to have exclusive control in this type of highway construction 'throughout' the State; (3) unlike local governmental units its authority embraces the whole state and affects the whole state and is not restricted to any one locality; (4) it is a 'state' agency entrusted with an undertaking which affects the 'whole' state; and (5) the Legislature has designated its duties as relates to condemnation by designating the area, direction, and counties

BLEED THROUGH POOR COPY

through which the first turnpike is to be built and by reserving to itself the designation of all further turnpikes. So in effect we have the State Legislature telling one of its agencies to go out and condemn certain property and build the turnpike, and providing that members of that agency shall be appointed in the manner in which all other appointive state officials in Florida are appointed, except cabinet officers, namely, by the Governor, and providing the initial funds for the operation of the agency."

A number of the grounds relied upon by the Court in the above case are not present in the case at bar. The Legislature in Kansas has not stated that the Authority is a part of the State, it has not stated that the Kansas Turnpike Authority is to have exclusive control over this type of highway construction "throughout the state", and the Legislature has not designated the area, direction and counties through which the first turnpike project is to be built.

Notwithstanding the clear differences present in the Florida case and the case at issue, we submit the Florida case is not in accord with the overwhelming authority throughout the United States.

QUESTION III.

**Was there substantial evidence before the trial court to support the judgment rendered in this action?**

As pointed out earlier in this brief, we seriously question that this court will wish to concern itself with the question of the sufficiency of the evidence before the trial court and the construction placed upon the contract by the trial court.

The Circuit Court of Appeals carefully reviewed the record, heard extensive arguments of counsel and then

concluded that the judgment of the trial court was a correct one.

Brief comment will be made, however, with regard to the statements of Petitioner contained on pages 18 to 20 of Petitioner's brief.

It is observed that each of the sections of the specifications upon which Petitioner relies is a portion of the *Standard Specifications, rather than the Special Provisions or Supplemental Specifications,* except the first two sections set forth.

Comment will first be made upon Special Provision No. 5 (R. 60-61), a portion of which is cited by Petitioner. This section has to do exclusively with maintenance, and not the rebuilding of an embankment as was performed by the respondent. Furthermore, the section specifically enumerates the things that the grading contractor is required to do, as follows:

> "Until such maintenance has been transferred to or has been assumed by the paving contractor, *the grading contractor shall; mow the areas* on which grass, weeds or other vegetation is growing as often as may be necessary with a field mower, leaving a stubble height of about 5 inches; *restore any washouts or eroded portions* in cuts or fills; *remove any slides* and dispose of the material as directed by the Engineer; *keep the ditches open; maintain and remove all excess mud,* brush, weeds and other debris from drainage structures, entrance channels, catch basins and other structures or locations; all of which shall be done over the entire width of the right-of-way for the length of the Turnpike covered by the Contract." (R. 61) (Emphasis added).

It is clearly seen that this provision does not require the rebuilding of an embankment once properly construc-

BLEED THROUGH POOR COPY

ted. *It deals solely with maintenance as distinguished from construction or re-construction.*

Supplemental Specification 8.2 (R. 62) set forth at page 19 of Petitioner's brief would appear to have no conceivable bearing upon the issues before this court.

Petitioner fails, however, to call attention to Standard Specification 5.4, which provides:

> "If there is a discrepancy between the Standard Specifications and the Supplemental Specifications or Special Provisions, the Supplemental Specifications and Special Provisions are to govern." (R. 88).

This section becomes of controlling importance when Section 20, Supplemental Specifications (R. 63-66), is examined. It is seen that a special set of new rules and regulations was provided for the compaction of earth work on this particular job. This Supplemental Specification cannot be overruled or over ridden by anything in the Standard Specifications. If there appears to be a conflict between Section 20 of the Supplemental Specifications and any of the provisions of the Standard Specifications, Section 20 must, of course, control.

When Section 20 of the Supplemental Specifications is read it is quickly seen that a contractor may be required to rework at his own expense an area properly constructed only when the yielding or soft spots are the result of (1) placing improper materials in the embankment, (2) failure to properly compact the embankment, or (3) failure to provide for surface drainage.

Petitioner does not contend that the additional work required following the rainfall was the result of any of these three conditions. Neither does the petitioner contend that the respondent was in any manner at fault.

This being true, Section 20 of the Supplemental Specifications clearly dictates that petitioner must pay for the additional work which the petitioner required respondent to perform.

## CONCLUSION.

We state first of all, that no special or important reasons exist for the granting of a writ of certiorari. This is an ordinary action for the recovery of money and the questions involved are neither novel nor of great public interest.

The question of whether the Kansas Turnpike Authority is a "citizen" or "one of the United States" has been so frequently and consistently answered by the federal courts of this country that there would seem to be no reason for the Supreme Court of the United States to again examine the entire record of this proceeding.

The third question concerning the construction of the contract entered into between the parties is again nothing more or less than an ordinary dispute such as frequently arises between parties to a commercial transaction. This dispute has been resolved by the trial court and reviewed by the Tenth Circuit Court of Appeals. It would appear that no helpful purpose would be served by a further examination of the record by this court.

We respectfully submit that the petition for writ of certiorari should not be granted.

CLARENCE V. BECK,
Citizens National Bank Building,
Emporia, Kansas,

SAMUEL MELLINGER,
Citizens National Bank Building,
Emporia, Kansas,

JOHN G. ATHERTON,
Citizens National Bank Building,
Emporia, Kansas,

BLEED THROUGH POOR COPY

**Statutes of Kansas.**

68-2002, G.S., 1959 Supp. "In order to provide for the construction of modern express highways or super-highways embodying, where feasible and necessary, safety devices, including center division, ample shoulder widths, longsight distances, multiple lanes in each direction and grade separation at intersections with other highways and railroads, and thereby facilitate vehicular traffic, provide better connections between the highway system of Kansas and the highway systems of the adjoining states, remove many of the present handicaps and hazards on the congested highways in the state, and promote the agricultural and industrial development of the state, the Kansas Turnpike Authority (hereinafter created), is hereby authorized and empowered to construct, maintain, repair and operate turnpike projects (as hereinbefore defined), and to issue revenue bonds of the authority, payable solely from revenues, to finance such projects. No toll road project shall be undertaken unless and until such project and the proposed location therefor have been thoroughly studied with respect to traffic, engineering, cost and financing nor unless such study shows: (a) That public funds for construction of a free expressway are not available; (b) that the construction of a toll expressway can be financed wholly through the investment of private funds in toll road revenue bonds; and (c) that the project and indebtedness incurred therefor will be entirely self-liquidating through tolls and other income from operation of the project."

68-2003, G.S., 1959 Supp. "There is hereby created a body politic and corporate to be known as the 'Kansas Turnpike Authority.' The authority is hereby constituted a public instrumentality and the exercise by the authority of the powers conferred by this act in the construction, operation and maintenance of turnpike projects shall be deemed

and held to be the performance of an essential governmental function."

68-2004, G.S., 1959 Supp. "The authority is hereby authorized and empowered to: (a) Adopt bylaws for the regulation of its affairs and the conduct of its business; (b) adopt an official seal and alter the same at pleasure; (c) maintain an office at such place or places within the state as it may designate; (d) sue and be sued in its own name, plead and be impleaded; (e) determine the location subject to the approval of the state highway commission, of each turnpike project financed under the provisions of this act, determine its design and the materials of construction, and construct, maintain, repair and operate the same; (f) issue turnpike revenue bonds of the authority for any of its corporate purposes, payable solely from the tolls and revenues pledged for their payment, and to refund its bonds, all as provided in this act; (g) fix and revise from time to time and charge and collect tolls for transit over each turnpike project constructed by it; (h) establish rules and regulations for the use of any such turnpike project; (i) acquire, hold and dispose of real and personal property in the exercise of its powers and the performance of its duties under this act; (j) designate the locations, and establish, limit and control such points of ingress to and egress from each turnpike project as may be necessary or desirable in the judgment of the authority to insure the proper operation and maintenance of such project, and to prohibit entrance to such project from any point or points not so designated; (k) make and enter into all contracts and agreements necessary or incidental to the performance of its duties and the execution of its powers under this act; (l) employ consulting engineers, attorneys, accountants, construction and financial experts, superintendents, managers, and such other employees and agents as may be neces-

sary in its judgment, and to fix their compensation; (m) receive and accept from any federal agency grants for or in aid of the construction of any turnpike project, and to receive and accept aid or contributions from any source of either money, property, labor or other things of value, to be held, used and applied only for the purposes for which such grants and contributions may be made; and (n) do all acts and things necessary or convenient to carry out the powers expressly granted in this act.

68-2007, G.S., 1959 Supp. "The authority is hereby authorized to provide by resolution, at one time or from time to time, for the issuance of turnpike revenue bonds of the authority for the purpose of paying all or any part of the cost of any one or more turnpike projects. The principal of and the interest on such bonds shall be payable solely from the funds herein provided for such payment.

"The proceeds of the bonds of each issue shall be used solely for the payment of the cost of the turnpike project or projects for which such bonds shall have been issued, and shall be disbursed in such manner and under such restrictions, if any, as the authority may provide in the resolution authorizing the issuance of such bonds or in the trust agreement hereinafter mentioned securing the same * * *.

"* * * Bonds may be issued under the provisions of this act without obtaining the consent of any department, division, commission, board, bureau or agency of the state, and without any other proceedings or the happening of any other conditions or things than those proceedings, conditions or things which are specifically required by this act."

68-2008, G.S., 1959 Supp. "Revenue bonds issued under the provisions of this act shall not be deemed to constitute a debt of the state or of any political subdivision thereof or a pledge of the faith and credit of the state or

of any such political subdivision thereof, but all such bonds shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement to the effect that neither the state nor the authority shall be obligated to pay the same or the interest thereon except from revenues of the project or projects for which they are issued and that neither the faith and credit nor the taxing power of the state or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds."

68-2009, G.S., 1959 Supp. "The authority is hereby authorized to fix, revise, charge and collect tolls for the use of each turnpike project and the different parts or sections thereof, * * *.

"* * * Such tolls shall be so fixed and adjusted in respect of the aggregate of tolls from the turnpike project or projects in connection with which the bonds of any issue shall have been issued as to provide a fund sufficient with other revenues, if any, to pay (a) the cost of maintaining, repairing and operating such turnpike project or projects and (b) the principal of and the interest on such bonds as the same shall become due and payable, and to create reserves for such purposes. Such tolls shall not be subject to supervision or regulation by any other commission, board, bureau or agency of the state. The tolls and all other revenues derived from the turnpike project or projects in connection with which the bonds of any issue shall have been issued, except such part thereof as may be necessary to pay such cost of maintenance, repair and operation and to provide such reserves therefor as may be provided for in the resolution authorizing the issuance of such bonds or in the trust agreement securing

BLEED THROUGH POOR COPY

the same, shall be set aside at such regular intervals as may be provided in such resolution or such trust agreement in a sinking fund which is hereby pledged to, and charged with, the payment of the principal of and the interest on such bonds as the same shall become due, and the redemption price or the purchase price of bonds retired by call or purchase as therein provided. * * *"

68-2010, G.S., 1959 Supp. "In the discretion of the authority any bonds issued under the provisions of this act may be secured by a trust agreement by and between the authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or without the state. * * *"

68-2011, G.S., 1959 Supp. "All moneys received pursuant to the authority of this act, whether as proceeds from the sale of bonds or as revenues, shall be deemed to be trust funds to be held and applied solely as provided in this act. * * *"

68-2012, G.S., 1959 Supp. "Any holder of bonds issued under the provisions of this act or any of the coupons appertaining thereto, and the trustee under any trust agreement, except to the extent the rights herein given may be restricted by such trust agreement, may, either at law or in equity, by suit, action, mandamus or other proceeding, protect and enforce any and all rights under the laws of the state or granted hereunder or under such trust agreement or the resolution authorizing the issuance of such bonds, and may enforce and compel such trust agreement or resolution to be performed by the authority or by any officer thereof, including the fixing, charging and collecting of tolls."

68-2015, G.S., 1959 Supp. "All private property damaged or destroyed in laying out and constructing said

turnpike project shall be restored or repaired and placed in its original condition as nearly as practicable or adequate compensation made therefor out of funds provided under the authority of this act."

68-2017, G.S., 1959 Supp. "Except as hereinafter provided in this section, when all bonds issued under the provisions of this act in connection with any turnpike project and the interest thereon shall have been paid or a sufficient amount for the payment of all such bonds and the interest thereon to the maturity thereof shall have been set aside in trust for the benefit of the bondholders, such project, if then in good condition and repair, shall become a part of the state highway system and shall thereafter be maintained by the state highway commission. * * *"

68-2019, G.S., 1959 Supp. "* * * That the issuance of turnpike revenue bonds or turnpike revenue refunding bonds under the provisions of this act need not comply with the requirements of any other law applicable to the issuance of bonds. Except as otherwise expressly provided in this section, none of the powers granted to the authority under the provisions of this act shall be subject to the supervision or regulation or require the approval or consent of any municipality or political subdivision or any commission, board, bureau, official or agency thereof or of the state."

68-2021, G.S., 1959 Supp. "The state highway commission and the Kansas turnpike authority are hereby authorized and empowered to contract with each other, by the terms of which contract or contracts the state highway commission may undertake (1) to provide personnel and equipment, either of the state highway commission or consulting or contracting firms, required in

BLEED THROUGH POOR COPY

making any traffic and cost studies or surveys or origin-destination studies necessary preliminary to financing by the Kansas turnpike authority of any particular toll project undertaken as authorized by law, and to do such work; (2) to provide personnel and equipment required, and to do any engineering, geological work, soils testing or materials testing which may be required by the Kansas turnpike authority either preliminary to the financing of any particular toll project authorized by law or which may be required after such financing and during the construction of such project: * * *"

68-2022, G.S., 1959 Supp. "The Kansas turnpike authority is hereby authorized to contract for the services as set out in section 1 (68-2021) which contracts shall provide, on behalf of the Kansas turnpike authority as follows: (1) That it shall reimburse the state highway commission out of the proceeds of the sale of bonds for any such project or, from any other funds available for the purpose, the amount so expended by the state highway commission on said particular project for such services rendered prior to the sale of such turnpike revenue bonds, and (2) it shall pay to the state highway commission, as billed by it, all charges made for such services done and rendered as a part of or necessary to the construction of such project."

68-2025, G.S., 1959 Supp. "The Kansas turnpike authority and the superintendent of the Kansas highway patrol are hereby authorized to provide by contract or agreement, as provided herein, for the policing of any toll or turnpike constructed and operated as permitted and provided by law. All such contracts or agreements shall be subject to the approval of the governor and, if made, shall provide that the total cost of said policing,

including, but not limited to all salaries, expenses, uniforms, equipment, retirement benefits provided for members of the Kansas highway patrol assigned to any toll or turnpike facility, vehicles, communication equipment, training of members and other items properly chargeable as costs of said policing shall be paid by the Kansas turnpike authority. * * *"

74-2001, G.S. 1949. "That there is hereby created a state highway commission which shall be a body corporate with powers to sue and be sued. * * *"

74-2006, G.S. 1949. "* * * The attorney general shall appoint an assistant attorney general, who shall be the attorney for the state highway commission, and whose salary shall be fixed and paid as provided for employees of said state highway commission. * * *"